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LAW REFORM IN MASSACHUSETTS.

In the present age of change and excitement, the law, like every thing else, which seemed to rest on firm foundations, is subject to sudden innovations. We have already repeatedly called the attention of our readers to the movements in other States. We hope to be permitted to direct their attention now to the state of things in Massachusetts. It is well known that, two years ago, a commission was appointed, composed of three of our ablest lawyers, with a pretty sweeping authority in regard to reforming our present system of practice; and their report has now been presented to the Legislature and ordered to be printed. The publication of that report is awaited with considerable anxiety by the members of the Bar, and the public generally, and inquiry has become rife as to the extent and character of the proposed changes. What changes are recommended, we cannot say; but it is rumored that the following points have received the attention of the commissioners, viz.: — the simplification of legal proceedings by reducing the number of forms of action; — the verification of pleadings, to the extent of requiring all allegations to be sustained by the oaths of the respective parties; — the removal of the disqualification of witnesses resulting from interest or infamy; — and certain provisions for securing

a more speedy examination of the parties themselves than bills of discovery afford.

Should the current reports prove correct, it will thus be seen that very important changes are contemplated, and we must be permitted to express a hope that the recommendations of the commission will receive that degree of attention to which the high professional character of its members, and the general tendency of the age, entitle them. Of several of the proposed changes, we have already spoken in another connection, in commenting upon the recent most thorough reform in New York. It is therefore unnecessary that we should again allude to them in detail. It is however, fortunately, within our power to present to our readers some most valuable testimonials of distinguished Jurists in the State of New York. They have been elicited by the distinguished member of the New York Bar, to whom they are addressed, and contain the opinions of Judges of the Supreme and Superior Courts of that State. They refer more particularly, perhaps, to the policy of uniting law and equity jurisdictions in the same tribunal, but as they also contain valuable suggestions as to the operation of the "Code," we offer no apology for introducing them: —

Albany, May 8, 1850.

Hon. David Dudley Field. My dear Sir — I take pleasure in answering your favor of the 6th instant, asking my opinion on the subject of certain inquiries made by Mr. Loughborough of Kentucky.

I regard the uniting of law and equity jurisdictions in the same tribunal, as one of the most desirable of modern reforms. There were great difficulties to encounter. There was a deeply rooted prejudice against breaking up two distinct and complicated systems of practice, with which all had become familiar; and it was exceedingly difficult to frame one system of practice applicable to both remedies. The principal obstacle was one of practice — not of principle; for every one was ready to concede, that it seemed palpably absurd, that a Court which was authorized to pronounce the law, should not have the power to administer justice between the parties. I think every day that passes will increase our surprise, that a separation of law and equity was ever tolerated.

It will take some time to reconcile all our lawyers to the change. Much is to be unlearned, and the system of practice to be learned must be perfected. This, it will take years to accomplish. The necessary ma-

chinery, though in most respects exceedingly well put together, cannot be made complete without the aid of experience in perfecting its details. But of the ultimate and entire success of the change I entertain no doubt.

Our present plan of taking testimony in open Court at the circuits, has many advantages over the late practice of taking proofs in chancery. I often try at the circuit, in a few hours, an equity cause that would have occupied several days before the Examiner, under the old system. When the parties are before the Court, it is easy to ascertain the real point in controversy, and to direct all the evidence to it. Having taken the evidence, and being, of course, familiar with it, much less time is consumed in the argument of counsel.

Very few such causes are tried by a jury. The counsel generally waive a jury, and try the cause before the Court. But if there is a jury, the Judge has only to sift out the real question of fact, and submit it in the form of a question to the jury. He then declares what remedies the parties shall have, on the facts admitted or found.

I am, very truly, yours, &c. &c. AMASA J. PARKER.

New York, 10th May, 1850.

DAVID DUDLEY FIELD, Esq. Dear Sir — I cheerfully comply with your request, "to give you the result of my observation on the practical operation of our blended system of law and equity, that you may communicate it to Mr. Loughborough," of Kentucky.

In the extensive practice which has come under my notice since the amalgamation, I have as yet seen no evils arising from it, nor any inconveniences which would not have occurred under the former system. In short, I have no hesitation in saying that the change has worked well. In the outset, efforts were made to obtain equitable remedies in cases to which they were not applicable. The minds of some members of the bar seemed to be entirely afloat, and I was applied to for an injunction, by way of attaching property, in a suit simply for goods sold; but this confusion appears to have been dispelled.

The trial of equity cases by jury, was a great stumbling-block in the way of those who were opposed to blending the systems, even after the new Constitution had abolished the Court of Chancery. This mode of trial had been open to parties in that Court in a qualified degree for twenty years; but such was the repugnance of the bar to its use, that it was seldom resorted to, and nothing but compulsory legislation, by allowing either party to require it, could overcome that repugnance.

I have had occasion recently to try two equity cases with a jury, and an account of them will perhaps illustrate the new system better than any speculative opinions. In one case, *B*—— v. *G. & E. M. S*——, the complaint stated a very lucrative partnership in the manufacture of gold pens, which, in plaintiff's absence, and in direct violation of the copartnership articles, defendants dissolved and excluded plaintiff from the concern. He prayed an injunction, a receiver, an account, and division of assets, and his damages by reason of the dissolution. The injunction was

granted *ex parte*. Then came a motion to dissolve, and a cross motion for a receiver. The former was denied, and the receiver was appointed. Meantime, defendants answered, justifying the dissolution by alleged misconduct, etc., of plaintiff, for which they claimed damages, and submitting to an account, etc. A judgment in part was entered by consent, directing the regular accounts to be taken, and a division made of the assets on hand. Both of these were done, and a report made and confirmed.

The cause was then tried before a jury, on the issues as to the dissolution and its causes, and the counter claims for damages. The trial occupied a week, and resulted in a verdict for plaintiff for $7500 damages. This enabled the Court to give a final judgment, winding up the whole controversy. You will observe that, under the old system, besides the chancery suit for the account, a suit at law for the damages would have been indispensable.

In the other case, *W*—— v. *H*—— & *M*——, the complaint claimed the right to redeem from H. a leasehold, to which W. had become entitled as receiver of one B——; the lease having been given to B., for whom H. was surety, to pay the rent, and then assigned absolutely by B. to H., and subsequently by H. to M. The charge was, that it was assigned to H. to secure him for his suretyship, and to M. with notice and not for value. H. answered, denying that it was as security, and averring it was leased to B. for H.'s benefit, &c. M. set up a *bonâ fide* purchase without notice.

At the trial, I drew up and submitted, in writing, to the jury, six questions, viz.: As to H.'s being the real lessee in the outset; as to the assignment being absolute, or to secure H.; as to M.'s purchase being for value; and next without notice, as to an alleged offer by W. to substitute other security to the lessor; and as to W.'s damages, if M. were entitled to retain the lease. The jury returned with consistent and satisfactory answers, negativing H.'s defence, sustaining M.'s, and estimating the damages at $500; upon which I gave judgment for M. against the plaintiff for costs, and for plaintiff against H. for $500, and costs.

In this case, under the old mode, several days would have been spent in the Examiner's office, taking testimony in writing, at an expense equal to half the costs of the suit; and the hearing would have occupied quite as long as the trial did before me, which was less than a day.

You will recollect our friendly arguments on the blending of law and equity procedure, and that in those as well as in print, I opposed the abolition of the Court of Chancery. My plan was, to ingraft on our chancery system, trial by jury when required by either party, and the oral examination of witnesses in all cases, whether before a jury or a chancellor. I am not prepared to say, that in a State where there are separate Courts of law and equity, *administered by separate Judges*, I would recommend a blending of the two. The advantages of a division of judicial business with reference to the subject of litigation, founded on established and intelligible modes of procedure, are not to be slighted; and in our old system, there were very few cases in which an error occurred in selecting the

proper forum, while there were hundreds which silently testified to the great advantages of the chancery organization.

I would institute extensive reforms, but I doubt whether I would abolish the Court. This doubt in my mind may be an undue bias, the effect of my long and intimate association with the business of the late Court of Chancery.

Where there are distinct systems of law and equity, *administered by the same Judge*, I have no hesitation on the subject. Unless each could be administered by a distinct Judge, I would amalgamate the forms of procedure at once. Our experience, while our Circuit Judges were Vice-Chancellors, was abundant to show, that there should be either an entirely distinct set of Judges, or a single and uniform system.

With great respect, I remain, very truly yours,

LEWIS H. SANDFORD.

Albany, September 20, 1850.

DAVID DUDLEY FIELD, ESQ. Dear Sir — When I met you a few weeks since, you reminded me of my omission to answer your letter, asking my opinion in relation to the *practical working* of our *Code of Practice*. When I saw you, I was about leaving town; and when I returned, I found myself obliged to devote myself industriously to the preparation of my cases for the approaching term of the Court of Appeals. I now embrace the first leisure to reply to your esteemed letter.

The leading principles upon which the reform embodied in the code is founded, are such as no government, when once adopted, will ever relinquish. There is, at this day at least, no reason why the distinction between the equity and common law proceedings should be preserved. Nor is there any more reason for preserving the different forms of actions at law. The provisions of the code, in this respect abolishing the distinction between law and equity, and the different forms of actions at common law, are, with perhaps here and there a single, if not a *singular* exception, approved and commended by our entire judiciary and bar.

The abolition of chancery proceedings under the operation of the *Constitution* and *Code* together, have been the means, in my judgment, of saving our present judiciary system from the evils which wrought the destruction of the former. My own deliberate conviction is, that had the old chancery system continued, our Courts, by this time, would have been irretrievably *swamped* with the accumulation of business.

There are, however, some serious evils connected with this great and radical change in the practice. These, however, are less chargeable to the account of the system itself than the judiciary and the bar. Old forms of pleading having been dispensed with, many seem to understand that there is no longer any such thing as *pleading*. Hence it is that our Courts are often perplexed and embarrassed with very crude specimens of pleading, abounding with prolix statements of evidence, requiring often much time and patience to glean from the mass, the true points of the case. I

have occasionally met this difficulty at the circuit. This, however, is not so much the fault of the system, as of the profession.

But there is another evil which lies still deeper. It is that we have not, and are not likely soon to have, any thing like a uniform *practical construction* of the provisions of the code. Each Judge feels at liberty to decide any question arising under the code for himself. He regards the opinion of another Judge as entitled to respect, perhaps, but not as authority. One Judge, endeavoring to follow the spirit which brought the code into existence, will interpret its provisions with a view to render it practicable and useful. Another, less favorable to change, will conform his decisions to the former practice, and that, too, perhaps, with no very friendly regard for the success of the system.

Some defects in the details have been developed by its practical operation, which may be easily cured; but the chief difficulties are, in my judgment, those to which I have referred. I see no other way but to leave these evils to be cured by time and experience. The system being so entirely new, we have as yet no *standard* by which we can infallibly determine, whether the construction which one Judge chooses to give any particular provision, or that of another, shall prevail. I see no other way but to let time and judicial wisdom, as it did in the common law practice, *work out this standard.*

The evil, too, resulting from an excessive laxity in pleading, is within the power of the Courts to correct. It will be a work of much labor to *educate* the bar to this new system of presenting their facts. But even as it is now, it is far preferable to the former practice. Here, if a party is unable to have his case presented to the Court upon its merits, unfettered by technicalities, it is wholly owing to the negligence or unskilfulness of his lawyer. It is an admirable feature of the system, that it possesses that flexibility which will enable counsel, with the exercise of a reasonable amount of skill, to present his case, so that it may be disposed of according *to its very justice*, without the hazard of passing off, as so many cases did, under the old system, without ever approaching the real merits of the controversy.

I have thus, my dear sir, frankly and cursorily, expressed to you my own views of the *practical working of the code*. Its adoption was a great step in improvement, as well as *progress*. The great and leading features of the system can never be abandoned. In its details it is yet defective. Some of these defects will be cured by legislation — others by experience. Although I have sometimes felt discouraged, for reasons at which I have already hinted, it is still my purpose, while I am honored with the station I now occupy, to give my best efforts to carrying out and perfecting a system, resting, as I am persuaded this does, upon the only sound basis of legal practice.

I remain, dear sir, with great respect, your obedient servant,

IRA HARRIS.

New York, December 26, 1850.

D. D. Field, Esq. Dear Sir — You have requested my opinion respecting the practical operation of our code of procedure, and particularly that part of it which abolishes the distinction between actions at law and suits in equity. I should have complied with your request earlier, but my time has been so much engrossed of late, as to prevent my doing so, and even now, I must be very brief.

The opportunities I have had to judge of the new mode of proceeding, and of the practice under the code, have been sufficient to satisfy me of the great advantage we have gained over the old system of practice. The common law distinction of actions being abolished, and as a necessary consequence, all forms of pleading as heretofore used, and the informal pleadings described in the code, and only to the extent therein allowed, being substituted, seems to me an improvement, which I think cannot fail to be acknowledged in proportion as the profession become familiarized to it.

In the trials of causes, I have found no difficulty in readily understanding, from the pleadings as now generally framed, what are the disputed points or issues to which testimony is to be adduced, or the evidence applied; and those who are called to the work of "distributive justice," are now spared the necessity, which was many times a disagreeable task, of non-suiting a plaintiff, or over-ruling a defence, merely because of a mistake in the form of action or of a plea, or of a variance between the pleadings and the proof; a result oftentimes of the most technical character, producing expense and delay, if not entirely defeating the ends of justice.

I am likewise in favor of the code, wherein it has abolished the distinctions between actions at law, and bills in equity. I confess I was always partial to the Court of Chancery as a distinct Court, but when it was overthrown in our State, and the administration of equity jurisprudence became blended in the same tribunals with that of law, under our new Constitution, which took effect in 1847, there appeared to me no longer any very good reason for keeping up such a distinction as the equity side and the law side of the same Court, in respect to its proceedings. The act passed May 12, 1847, for the purpose of carrying into effect the provisions of the Constitution in relation to the judiciary, did indeed recognise that distinction, and we were called upon to frame two sets of rules, one for the practice in equity suits, and the other in actions at law. At that time I ventured to express a hope that the necessity for such a distinction might soon be removed; and I think the code has wisely ordered a uniform course of proceeding in all actions, both for law and equity.

I am, with great respect, your ob't servant,

Wm. T. McCoun.

Recent American Decisions.

District Court of the United States. — Northern District of New York, at Auburn, Dec. 18, 1850.

The Globe.

A judgment *in rem* rendered in a Court of the State of Ohio, in virtue of the Act of the General Assembly of that State, entitled "An Act providing for the collection of claims against steamboats and other water crafts, and authorizing proceedings against the same by name," passed February 26, 1840, and the act explanatory thereof, passed February 24, 1848, is to be regarded as a nullity by judicial tribunals in other States, unless the owner of the vessel proceeded against appeared in the suit and had an opportunity to make a defence.

The title, if any, acquired by the purchaser at a sale of the vessel on execution, in virtue of such a judgment, is subordinate to the lien in favor of a material-man, conferred by the general maritime law of the United States and the act of Congress of February 26, 1845, ch. 20.

A judgment recovered in a proceeding under the statute of Ohio, in a Court of that State, for supplies, is not a bar to a subsequent suit *in rem* in admiralty, for the same supplies.

Quere — Whether the provisions of the statute of Ohio are not repugnant to the Constitution and laws of the United States.

The material facts of the case are stated in the judgment of the Court.

I. T. Williams, *Chas. H. S. Williams*, and *Talcott*, for the libellant; *Green & Havens*, contra.

Conkling, J. — This is an action against the steamer *Globe* for the value of certain supplies furnished by the libellant, William H. Glenny, at Buffalo, between the 13th of June, 1848, and the 10th of September, 1849, while the Globe was owned in the State of Michigan, enrolled and licensed at the port of Detroit, and employed in the business of navigation and commerce on the lakes. A claim was interposed by Joshua Maxwell, as owner, and a defensive allegation was brought in his behalf, in which it was pleaded that the Globe had, on the 26th day of April last, been sold and duly conveyed for the sum of $17,000 by Elisha T. Sterling; by whom, on the 9th day of March

last, she had been purchased at a public sale made by the sheriff of Cuyahoga county, in the State of Ohio; that such sale was in virtue of an execution issued by the Supreme Court of Cleveland, on a judgment rendered in February last, in favor of the Cuyahoga Steam Furnace Company, for the sum of $3836·40 damages, and $106·86 costs; that such judgment was recovered in a proceeding instituted on the 20th of September, 1849, against the Globe, under an act of the General Assembly of the State of Ohio, passed February 26, 1840, and an act explanatory thereof, passed February 24, 1848, authorizing proceedings against steamboats and other vessels navigating the waters within or bordering on that State; which acts are set forth *in extenso* in the defensive allegation. And it is thereby also further pleaded that, during the same month of September, other suits of the same kind were in like manner instituted against the Globe, by other citizens of Ohio, wherein judgments were also recovered at the same term, and on which executions were successively issued to the Sheriff of Cuyahoga county, all before the sale by him to Sterling. These judgments amounted in the aggregate to the sum of $13,442·50, leaving a balance of only $457·50 of the sum for which the Globe was sold; which sum was probably absorbed, chiefly, if not entirely, in poundage and interest.

The claimant also further alleges that, on the first day of November, 1849, a proceeding of the same nature was instituted by the libellant against the Globe, in the same Court, for the identical cause of action on which the present action is founded, and that a judgment was recovered therein for the sum of $522·02, besides costs. It is necessary here to observe that two other actions for supplies are pending against the Globe before this Court, commenced simultaneously with this — the one by the firm of *Willard & Munger*, citizens of Buffalo, and the other by the *Buffalo Steam Engine Company;* which, by agreement of parties, were brought to a hearing conjointly with this, and in which the pleadings and allegations of the parties

are the same as in this — the libellants in these two latter causes having also, simultaneously with the libellant Glenny, instituted proceedings and recovered judgments against the Globe under the Ohio statute. The aggregate amount of these three judgments is about $2766·91; upon neither of which does it appear that any execution had been issued, nor has either been satisfied wholly or in part.

It is unnecessary to refer particularly to the evidence given at the hearing, because there is little controversy concerning the facts on which the rights of the parties depend. It appears that the supplies for which the libellant claims compensation were in fact furnished, and that he is therefore entitled to have their value decreed to him, unless the matters insisted on, as already stated, by the defendant, the truth of which is also established, constitute a valid defence. This, therefore, is the point to be determined.

It was strenuously and ably argued by the counsel for the claimant, 1st, that in virtue of the sale by the sheriff of Cuyahoga county to Sterling, and of his subsequent sale and conveyance to the claimant, the latter acquired an absolute title to the Globe, discharged of the maritime lien which the libellant is seeking in this action to enforce; and 2d, that, conceding the reverse of this proposition, the lien was extinguished, on the principle of *transit in rem judicatum*, by force of the judgment recovered by the libellant in Ohio.

The questions thus presented for decision are novel and important, and I have accordingly felt it to be my duty to bestow upon them a careful scrutiny and deliberate consideration.

The sale of the property of a defendant, by execution on a judgment in a personal action, invests the purchaser with such title and interest only as the defendant possessed at the date of the judgment or levy. If the defendant had no title, the purchaser acquires none; and if the property was previously incumbered, the incumbrance remains. There can be no doubt, therefore, that the lien or privilege con-

ferred by the maritime law upon a material-man would still adhere to the ship, notwithstanding its sale by execution on a judgment against the owner. But it was argued by the counsel for the defendant, that the judgment under which the Globe was sold, was a judgment *in rem*, and that *as such* it was conclusive against all the world. That the suits in the Ohio Court were, in form at least, against the Globe *in specie*, and therefore *in rem*, is certain. The first section of the act under which they were instituted, declares that for demands like those of these Ohio creditors, the vessel shall be liable; and by the 2d section it is enacted, that "Any person having such a demand may proceed against the owner or owners or master of such craft, or against the craft itself." The 3d and 4th sections of the act prescribe the mode of proceeding against the vessel. A precipe is to be filed against it by name, accompanied by a bill of particulars verified by oath; whereupon a warrant is to be issued against the vessel, directing its arrest and detention until it shall be discharged by due course of law. The records produced at the hearing show that these creditors elected this form of remedy, and that the steps prescribed by the act for that purpose, were, or were intended to be pursued. Not only so, but, according, it seems, to the practical construction given to a provision contained in the 6th section of the act, that "The pleadings and proceedings shall be as in other cases, the Globe was personified in the pleadings, as the contracting party defendant — the materials and supplies being alleged to have been furnished at her request, and she being alleged to have promised to pay for them. She is represented, moreover, as having appeared by attorney, and pleaded the general issue and notice of set-off — no real person being named in the record as a party to the suit, except the plaintiff.

The pleadings and judgment which led to the sale of the Globe were therefore literally *in rem;* and it must be conceded, also, as a general rule, that what in the authorities, cited at the hearing, are denominated judgments *in*

rem, are followed by the legal consequences ascribed to them by the defendant's counsel. The question is, whether this rule is applicable to the present case. This is denied by the libellant's counsel; who insist, in the first place, that the judgment was of no validity whatever, for want of any notice to the owner of the vessel; and they have referred to numerous authorities in support of this proposition. The authorities relied on by them consist of a series of decisions in the national and state Courts, asserting, with one voice, the necessity of notice in some form, to the party to be affected adversely, by judicial proceedings in whatever form; and it is undeniable that when the rights of the litigants depended on a judgment, unless it appeared either that such notice had been given, or that the defendant or party in interest had in fact appeared and had an opportunity to defend his rights, the judgment has uniformly been treated as a nullity, by the Courts both of England and of this country.

Thus in the case of *Fisher* v. *Lane and others*, (3 Wils. R. 297,) which was an action of assumpsit for goods sold and delivered, the defence was, that the money for which the action was brought had already been once paid, in consequence of a judgment and execution upon a foreign attachment in London against the defendants as garnishees, in a suit against Fisher, the plaintiff. But it appearing that no personal notice of the suit had been given to Fisher — the custom of London, as it was shown, not requiring such notice — although the judgment in the principal suit was not rendered until after four defaults, nor that against the defendants as garnishees, until after summons to show cause, the defence was overruled. "Customs of particular cities" observed Lord Chief Justice De Grey, "may deviate from the course of the common law, but a custom *contrary to the first principles of justice* can never be good; so this custom not to summon or give notice to a defendant in a suit commenced against him, is contrary to the first principles of justice, and (in my opinion as at present advised) cannot be good." A verdict for the

plaintiff subject to the opinion of the Court having been taken, the whole Court concurred in this opinion, and gave judgment for the plaintiff.

In the case of the *Mary* the same doctrine is asserted by the Supreme Court of the United States. "It is," said Chief Justice Marshall, "a principle of *natural justice, of universal obligation*, that before the right of an individual be bound by a judicial sentence, he shall have notice, either actual or implied, of the proceedings against him." (9 Cranch, R. 126, 3 Cond. R. 306.) In the case of *Bradstreet* v. *The Neptune Ins. Co.* (3 Sumner's R. 600, 607, 608,) referring to a case of seizure and condemnation under a municipal law of Mexico, Mr. Justice Story declared it to be "A rule founded in the *first principles of natural justice*, that a party shall have an opportunity to be heard in his defence before his property is condemned." "If," he added, "a seizure is made, and condemnation is passed without any public notice of the proceedings, so that the parties in interest have no opportunity of appearing and making a defence, the sentence is not so much a judicial sentence, as an arbitrary sovereign edict. It has none of the elements of a judicial proceeding, and deserves not the respect of a foreign nation. It ought to have no intrinsic credit given to it, either for its justice or its truth, by any foreign tribunal. It amounts to little more, in common sense and common honesty, than the sentence of the tribunal which first punishes and then hears the party — *castigatque auditque*. It may be binding upon the subjects of that particular nation. But upon the eternal principles of justice it ought to have no binding obligation upon the rights or property of the subjects of other nations; for it tramples under foot all the doctrines of international law; and it is but a solemn fraud if it is clothed with all the force of a judicial proceeding. I hold, therefore, that if it does not appear, from the face of the record of the proceedings *in rem*, that due notice by some public proclamation, or by some notification or monition, acting *in rem* or attaching to the thing, so that the parties in

interest may appear and make defence, and in point of fact the sentence of condemnation has passed upon *ex parte* statements without their appearance, it is not a judicial sentence, conclusive of the rights of foreigners, or to be treated, in the tribunals of foreign nations, as imparting verity in its statements or proofs."

This language of Chief Justice Marshall and Mr. Justice Story was applied to the proceedings of foreign Courts, and is to be considered as having been intended to refer especially to such proceedings. But language of the like import has been repeatedly held, and the principles it inculcates enforced, with respect to the judgments of the Courts of other States. (1 Kent's Comm. 261, note c. (3d edition), and the case here cited.) The Constitution of the United States, it is true, declares that "Full faith and credit shall be given in each State to the public acts, records and proceedings of every other State," (Art. 4, sec. 1); and Congress, in pursuance of authority for that purpose conferred by the Constitution, has, by the Act of 26th May, 1790, (ch. 11), declared that such records and judicial proceedings, authenticated in the manner prescribed by the act, "shall have *such* faith and credit given to them in every Court of the United States, as they have by law or usage in the Courts of the State from whence the said records are or shall be taken." But this does not prevent an inquiry into the jurisdiction of the Court, in which the original judgment was rendered, to pronounce the judgment, nor an inquiry into the right of the State to exercise authority over the parties, or the subject-matter, nor an inquiry whether the judgment is founded in and impeachable for a manifest fraud. The Constitution did not mean to confer any new power upon the States; but simply to regulate the effect of their acknowledged jurisdiction over persons and things within their territory. It did not make the judgments of other States domestic judgments to all intents and purposes; but only gave a general validity, faith and credit, to them as evidence. No execution can issue upon such judgments, without a new suit in the

tribunals of other States. And they enjoy not the right of priority or privilege, or lien, which they have in the State where they are pronounced, but that only which the *lex fori* gives to them by its own laws, in the character of foreign judgments. (Story, Confl. Laws, § 609; Story's Comm. on the Const., ch. 29, § 1307; 1 Kent's Comm. 261, note c.; *M'Elmoyle* v. *Cohen*, 13 Peters, R. 312; 1 Greenl. Ev. § 548; Ib. notes.) To this extent, then, the judgments of other States are to be regarded as foreign.

Now the term *jurisdiction*, when applied to a personal action, imports a rightful authority over the cause or subject-matter, and over the person of the defendant; and when applied to a proceeding *in rem*, it imports the like authority over the *res*, and, so far at least as the *res* is concerned, over the person. See 1 Greenl. Ev. § 540, 541, 651, and the cases there cited. In general, and with certain exceptions which it is unnecessary here to notice, jurisdiction over the subject-matter will be presumed. (*Rose* v. *Himely*, 2 Cranch's R. 241; 2 Cond. R. 98; *Bloom* v. *Burdick*, 1 Hill's R. 130). But, as already observed, no judicial tribunal can acquire a rightful jurisdiction over the person or thing without due notice of the proceeding; and this must appear in the record itself, or else it must be shown that the defendant or party in interest did in fact appear and have an opportunity to be heard in his defence. (*Bradstreet* v. *Heath*, 13 Wend. R. 607; *Bradstreet* v. *The Neptune Ins. Co.*, 3 Sumner's R. 500, 607, 608; *Sawyer* v. *The Marine F. & M. Ins. Co.*, 12 Mass. R. 291, 295.) But in the case before the Court, no notice in any form appears on the face of the record, nor is it pretended that any was in fact given. Indeed, the act under which the proceeding took place, requires none; and this novel feature of the act is rendered still more remarkable by another provision contained in it, which purports to make the judgment to be rendered, in effect, a judgment *in personam* as well as *in rem;* by directing, in case of a deficiency of proceeds from the sale of the vessel, to satisfy the judgment, that "the balance shall remain to be col-

lected *on execution* as upon other judgments." It does appear by the record, however, as already observed, that a gentleman appeared as the attorney of the vessel, and it was admitted at the hearing that he was employed by her owner.

The latter resided at the time at Detroit, in the State of Michigan, and his appearance by attorney affords an answer to the objection of want of notice, to the extent of his interest in the Globe.

After what has been observed, it is unnecessary to add, that, but for the appearance by attorney of the owner of the Globe, it would have been my duty to hold the judgment in question a nullity. If it is valid, it owes its validity, therefore, to a fortuitous circumstance not provided for or contemplated by the act, and would doubtless have been rendered if there had been no appearance in the case. It was, I perceive, for the precise amount claimed by the plaintiff, and this is all that could have been adjudged had the judgment been taken by default. It is upon the act itself, therefore, that the objection really falls.

We have seen why it is that notice is held to be indispensable to the exercise by judicial tribunals of a rightful jurisdiction; and why, when this ingredient is wanting, their judgments are without extra-territorial force. Is the great principle of justice by which this condition is enjoined, less obligatory upon the Legislatures of the several States of the American Union, than upon their Courts? It is declared by Ch. J. Marshall to be "of universal obligation." Can it, by any reasonable intendment, be supposed that the people of the State of Ohio designed to invest their Legislature with authority to disregard it? And if they did, are such acts of legislation binding upon the judicial tribunals in other States? But it was intimated by the counsel for the claimant, that the extra-territorial obligation of this act might be maintainable, on the ground that every nation possesses the power of *confiscation* over all property situate or coming within its territories; and authorities were cited in support of this doctrine. I con-

fess my surprise that such an argument should have been pressed into this discussion. Confiscation is either an act of penal justice for the punishment of great crimes against the State, (Black. Comm. 299), or the exercise of a belligerent right against the property of public enemies, (Kent's Comm. 61–66); not the arbitrary seizure of the property of one person, whether citizen or stranger, for the benefit of another person.

So long as it shall be the pleasure of the Legislature of Ohio to suffer this act to remain unrepealed, and the Courts of that State shall deem it to be their duty to carry it into effect, its unavoidable evils must be submitted to; but beyond the limits of that State there can be no obligation founded, either in law, justice, or comity, unnecessarily to aggravate those evils. It is my desire, not less than my duty, nevertheless, to abstain from any animadversions upon it, not required by the actual exigencies of the case before me; and if it is true, as it was further argued by the counsel for the libellant, that conceding the validity, in the ordinary sense of the term, of the judgment in question, it falls short of the legal effect attributed to it by the advocates of the claimant, it is unnecessary, so far as the sale of the Globe is concerned, to determine whether the judgment under which the sale took place, was valid or not. Was this, then, *such* a judgment *in rem* as is or can properly be held to work an indefeasible change in the thing proceeded against? The act itself furnishes no answer to this question. It is therefore to be determined by the application of general principles; and looking at it in this light, it does appear to me that the answer which ought to be given to it is not even doubtful.

The proceedings prescribed by the Ohio statute are *sui generis*, and therefore anomalous. They have some resemblance to the proceeding usually denominated Foreign Attachment, and some also to that prescribed in the New England States, whereby the property of the defendant may be attached and held in custody on mesne process in a personal action to satisfy the judgment, if any, to be

obtained by the plaintiff. But they differ essentially from both, and they are still more unlike the proceedings of a Court of Admiralty, or of the English Court of the Exchequer in cases of municipal seizure, whose decrees and sentences *in rem* are said to be binding on all the world.

Law is said to be the perfection of reason. It would be strange, therefore, if the maxim *cessante ratione cessat lex* had not found a place among its axioms. Now the well known reason, why a judgment *in rem* is held to be conclusive upon all interests and titles in controversy before the Court, is, that all persons having an interest or title in the subject-matter, are, in law, deemed parties ; and they are deemed to be parties, because they are permitted, and, by the more effective forms of notice of which the case is susceptible, are summoned to become so in fact. The mode of procedure differs slightly in different countries. In this country it is as follows. If it is in behalf of the United States for a forfeiture, there must always have been a previous public seizure and detention of the thing proceeded against. This is followed, and when the proceeding is at the suit of a private person, the action is commenced by the exhibition in Court of a pleading setting forth the grounds of the proceeding, and praying process of arrest and monition, which is accordingly issued. In virtue of the warrant of arrest, the marshal takes into his custody the vessel or other thing, and in obedience to the command of the writ of monition, which however is usually incorporated with the warrant, he posts a notice, embracing the substance of the libel, on a conspicuous part of the thing, and publishes it in one or more newspapers near the place of arrest, calling on all persons having any right, title or interest in that thing, to appear in Court on a certain future day, and assert their claims, on pain of being pronounced in contumacy and default. The right to do this by suitable allegations is fully recognised and guarded, untrammelled by technical niceties, not only during the pendency of the original suit, but until the final disposition of the

proceeds of the sale of the property, should a sale be decreed. Such, in brief, is the proceeding *in rem*, which is held obligatory in its results upon all the world. To those not familiar with it, it may seem to be an exception in this respect to the rule which limits the binding force of judgments at common law to the actual parties and their privies. But in reality it is not; for it binds only those who are at least potentially parties to it, and who have an opportunity, if they choose to avail themselves of the privilege, not only to contest the claims of the libellant, but to supersede him by setting up superior claims of their own. After what I have already said of the proceedings prescribed by the Ohio statute, it is hardly necessary to add, that, with the exception of being in form a proceeding *in rem* instead of *in personam*, it is the reverse of that which I have described, and wholly wanting in the peculiar element on which the conclusive effect of the latter depends. Admitting, therefore, that this Court is bound to treat the sale of the Globe to Sterling as valid, it follows, that to ascribe to it any efficacy beyond that of a sale on execution under a judgment recovered in an ordinary personal action, would be to ascribe to it an effect without a cause, and would, as I believe, be repugnant alike to law and to common sense. Such a doctrine would be less sweeping, and therefore less mischievous in its consequences, and might even appear to derive some countenance from analogy, if the remedy had been limited to those demands for which a lien is conferred by the maritime law. But the act not only makes no distinction between foreign and domestic vessels, but subjects all to "seizure" for debts contracted by the *owner*, steward, *consignee* or *other agent*, as well as by the master, "for injury done to persons or property by such craft;" and "for any damage or injury done by the captain, mate, or other officer thereof, or by any person under the order or direction of either of them, to any person who may be a passenger or hand" on board. The argument is, that a sale in virtue of a judgment for any one of these causes of action, has the effect of displacing and extinguishing the

lien of a mariner or material-man, so highly favored in law as to be held paramount, not only to the title of a *bonâ fide* purchaser, without notice, but to that of the government acquired by forfeiture. To such a doctrine I cannot yield my assent.

But there is a farther objection to this part of the defence, not adverted to at bar, but which appears to me well worthy of consideration. The Constitution declares that the judicial power of the United States shall extend "to all cases of admiralty and maritime jurisdiction;" and by the Judiciary Act of 24th Sept. 1789, the District Courts are invested with "exclusive cognizance of all civil causes of admiralty and maritime jurisdiction." The Constitution also confers upon Congress power "to regulate commerce with foreign nations *among the several States*, and with the Indian tribes:" and this power is also held to be exclusive. The admiralty and maritime jurisdiction conferred by the Constitution, having been held to be limited to cases arising on the high seas or on tide-waters, and experience having at length, as it was supposed, demonstrated the necessity of extending the admiralty forms of remedy to certain cases arising on the lakes, this was done by the act of 26th Feb. 1845, ch. 20. These constitutional and legislative provisions do not interfere with the common law jurisdiction of the State Courts, but leave the suitor at liberty to pursue his concurrent common law remedy in these Courts, whenever he sees fit. But I doubt whether it is competent for a State Legislature to interpose by creating new remedies unknown to the common law, and calculated to supersede and defeat those provided by the Constitution and Laws of the United States, thus exhausting the sources of federal jurisdiction, and, by local regulation, introducing discord and confusion where the common good requires that harmony and regularity should prevail. In this very case, but for this Ohio statute, the Cuyahoga Steam Furnace Company, on whose execution the Globe was sold, would probably have instituted a suit in admiralty in the District Court of Ohio; and in that case

all the Ohio and New York creditors with whom this suit has made us acquainted, could, at little expense, have intervened for their interest, and justice would not have been violated by the appropriation of the whole proceeds of the sale of the Globe to the satisfaction of the Furnace Company and of the other creditors who had the good fortune, by being on the spot, seasonably to learn that the Globe had been arrested, to the total exclusion of those, who, by their remoter residence, were left in ignorance. Indeed, as the suits in favor of the Ohio creditors were not simultaneously commenced, it was only because the Globe brought enough to satisfy them all, that some of them got paid at all; for it was shown at the hearing to be the practice, when several suits are instituted, to assign priority of payment to the parties according to the order of priority among them in point of time. The act, moreover, as already intimated, makes no provision for intervention at any stage, and when the vessel is once sold upon a notice of ten days — the only notice required by the act — whatever balance of the proceeds may remain after satisfying the execution, is peremptorily directed by the act to be paid over to the owner by the sheriff, without, as I understand the act, any judicial order for that purpose, and without any provision, therefore, for ascertaining to whom the vessel really belonged. But a State law authorizing such proceedings must necessarily interfere, if it does not directly conflict, with the authority and policy of the national government; and it seems too obvious to require further demonstration, if the proceedings under the act in question are to have the conclusive effect attributed to them by the counsel for the claimant, that they will, to the extent of their operation, render that authority and policy nugatory.

It should be remembered, however, that this act was passed in 1840, five years before the act of Congress extending the admiralty forms of remedy to our inland waters; and it seems but reasonable, as it is but respectful, to hope that it will ere long be repealed — its objectionable provisions

being supplied, if it should be deemed necessary, by giving a limited and carefully regulated lien in favor of ship-wrights and material-men, like that given by the laws of Pennsylvania, the New England States and New York, which may be enforced, as it generally is in the States I have mentioned, in common with the lien given by the general maritime law, by the District Court of the United States.

It remains now to determine whether the judgment recovered by the libellant against the Globe, under the Ohio statute, is a bar to this action.

It is obvious that this judgment is obnoxious to all the objections which have been urged against the validity of that under which the Globe was sold; and there is also a further objection arising from the alleged irregularity of the proceedings under the act in this instance. It is very clear that, if the judgment is without validity, it can be no impediment to the libellant's right to maintain this action. But for obvious reasons I choose to abstain from any further discussion on this point, unless it is necessary to the just decision of the case before me; and in my opinion it is not necessary.

It has already been observed that the fund, arising from the sale of the vessel, was exhausted in satisfying the claims of the creditors, who, being prior in point of time, were entitled, by the laws of Ohio, to priority of payment. This, therefore, is not a vexatious suit — there being no pretence of satisfaction, either actual or potential; for it is unnecessary to re-assert the utter futility of the right which the act purports to secure, of resorting to an execution against any other property or against the person of the owner; nor can it be necessary to enter into a formal refutation of the suggestion that he may be sued on the judgment. It does not purport to be a judgment against him, nor did he by his appearance to defend his interest in the Globe render himself personally amenable to the Court. (*Bissell* v. *Briggs*, 9 Mass. R. 468; Story, Confl. Laws, § 549; 1 Greenl. Ev. § 542.)

Precisely under what view of his interest it was that the libellant saw fit, during the pendency of the proceedings by the Ohio creditors, to institute his suit in Ohio, does not appear. It seems reasonable to conclude, however, that, hearing of these proceedings, he was induced by the fear of losing his demand, and the hope that by that means he might secure it, to try the experiment to which he resorted. It may, or may not, be a hardship to the claimant to be obliged to pay this debt; this depends on circumstances unknown to the Court. But be this as it may, there can be no injustice in allowing the libellant to enforce the lien, which as a material-man he acquired in virtue of the act of Congress and the general maritime law. He has, on his part, established a right, *primâ facie*, to a decree in his favor. The prior judgment is set up as a defence purely technical in its nature, having no equity to recommend it, and to result, if successful, in actual injustice to the libellant.

On the other hand, it is an established general rule of law, that when any matter has once been put in suit, and decided upon in a Court of competent jurisdiction, the same subject cannot again be brought into litigation. The reasons on which this rule is founded are: 1. That no one ought to be twice harassed on account of the same cause of action; 2. That it is the interest of the public that there should be an end of litigation. In the case of a judgment recovered, as in the present case, on a contract, a further technical reason is also assigned; viz., that the plaintiff has, by his voluntary act, converted his contract into the higher security of a judgment, and that the contract has thereby become *merged*.

It is true, as argued at bar, that Courts of Admiralty are bound, in the exercise of the limited jurisdiction that belongs to them, to conform their decisions to the principles of equity, and in general to disregard mere technicalities. But there are some axioms of jurisprudence, so deeply founded in considerations of general expediency, that they ought to be enforced even at the occasional expense of

particular injustice; and they accordingly are so by Courts of equity, as well as by Courts of law.

And, considering the magnitude of the evils which the rule in question is designed and adapted to prevent, and the danger of relaxing it, there is great reason for classing it among those axioms to which I have referred. But, in order to determine its applicability to the case before the Court, it is necessary to attend to one of the limitations which define its scope. This limitation excludes whatever may properly be denominated a *collateral or concurrent remedy.* It is hardly necessary to cite an authority for this proposition; but it is distinctly stated by Lord Ellenborough, C. J., in the following terms: "A judgment recovered in any form of action is still but a security for the original cause of action, until it is made productive in satisfaction to the party; and therefore, till then, it cannot operate to change any other collateral concurrent remedy which the party may have." (*Drake* v. *Mitchell and others*, 3 East's R. 251, 258.) To render a judgment recovered at bar, it must appear that the former suit was founded on the same identical cause of action. When it is on a contract, it must be on the same identical contract. Thus, if the contract be joint and several, the better opinion appears to be, that the judgment in an action against one is no bar to an action against all; and, on the other hand, that a judgment against all, jointly, is not a bar to a subsequent action against one alone. (1 Greenl. Ev. § 539 *a*; *The United States* v. *Cushman*, 2 Sumn. R. 426, 437, 441, and the authorities there cited, particularly *Leshmore* v. *Fletcher*, 1 Crompt. & Meeson's R. 623.) So also it has been held, that a judgment in an action of covenant on a mortgage is no bar to an action of debt on the accompanying bond. Another qualification of the rule is, that a party is not to be concluded by a judgment recovered in a prior suit or prosecution, when, from the nature and course of the proceedings, *he could not avail himself of the same means of redress* which are open to him in the second suit. (1 Greenl. Ev. § 524.) Though it is true, therefore, with

respect to real as well as personal actions, that a judgment is a bar to another action of the same or the like nature for the same thing, yet this is true only where the second action is of the same or of inferior degree; for if it is of a higher nature, the former judgment is not a bar. A judgment in either of the other forms of real action, therefore, is no bar to a writ of right. (*Kitchen and others* v. *Andrews*, 3 Wils. R. 304, 305.) These principles and the reasons on which they rest are, in my judgment, decisive against the operation of the former judgment in the present case. The action was against the Globe, *in specie;* the cause of action, as set forth in the declaration, being an assumpsit by the vessel herself. The proceeding had its origin and its sanction in a local municipal law alone. The very foundation of the action was a fiction, which was rendered effective by a form of procedure unknown to the common or civil law. It was a proceeding *in rem*, not in the ordinary sense of that phrase, and is to be so denominated only because it acted directly upon a thing instead of a person. The means of redress it promised consisted in the right to have the particular thing proceeded against, sold subject to all valid antecedent incumbrances, and to receive the proceeds of the sale if any should remain after satisfying all prior claims upon the fund. Neither the person nor any other property of the owner could be reached through the judgment to be obtained. As a security, therefore, the judgment was inferior to a judgment against the owner of the vessel in a personal suit, and it will not be pretended that such a judgment would be a bar to this action. On the contrary, the present action is grounded on a lien or privilege conferred by the general maritime law of the United States, extended by force of an act of Congress to the lakes. This lien results from an implied hypothecation of the vessel by the act of the master; and it has priority over all common law liens; over the title acquired by purchase or by forfeiture; and it yields only to the lien of the mariner derived from the same source. I am of opinion, therefore, that this

action is to be regarded as a collateral concurrent remedy, to which the libellant had a right to resort notwithstanding the former judgment. There must accordingly be a decree in his favor, and a like decree in each of the other actions which I have mentioned, for the sums proved or admitted at the hearing to be due to the libellants respectively.

In the Surrogate's Court of the County of New York.

IN THE MATTER OF THE WILL OF MARY MATILDA VAN WERT.

A married woman, being also an infant, executed a will in 1844, under a power given to her by her father's will to dispose of certain property by will in case of her decease without issue. In 1849, being still a *feme covert*, though of full age, she executed a proper will, conformably to the New York statute of April 11, 1849. Held that the latter will revoked the former, so far as the former was duly executed, and that the last must be established as a valid will of real and personal estate.

Mr. Sherwood appeared for Merit Van Wert, who propounds the will.

Mr. Daniel Lord, for James Milton Benedict and Theodore Hudson Benedict.

The facts of this case are fully set forth in the opinion of the Surrogate, Hon. A. W. BRADFORD.

In this case, John Sherwood propounded for probate, an instrument dated November 25, 1844. Merit Van Wert having subsequently also offered for proof, as the last will and testament of the deceased, another paper dated June 28, 1849, I found it necessary to order both applications to be consolidated, tried and heard as one proceeding.

The instrument executed in 1844 purports to have been made under a power given to the decedent by the will of James Benedict, her father, to dispose of certain property in case of her decease without issue, "by her last will and testament, or writing in nature thereof, executed under hand and seal in the presence of one or more competent witnesses, notwithstanding coverture." The decedent was born June 17, 1824, and when she attempted to execute

this power in 1844, was an infant and a *feme covert.* The paper executed in 1849, purports to be a proper will. The decedent was at that time of full age, though a *feme covert.* By the act of the State of New York, amending "the act for the more effectual protection of the property of married women," passed April 11, 1849, any "married female" is authorized to "devise real and personal property, and any interest and estate therein, and the rents, issues and profits thereof, in the same manner and with like effect, as if she were unmarried." This act substantially repeals the restrictions contained in the Revised Statutes of the State of New York, against the validity of a will by a married woman, in regard to real (2 Rev. Stat. 57, § 1), and personal estate (2 Rev. Stat. 60, § 21). It removes a personal disability, and I do not understand that the power given to devise, is limited to subsequently acquired property. If it were, however, inasmuch as the capacity exists to make a will, when the will of a *feme covert* made subsequently to the passage of the act is properly proved, it is my duty to admit it to probate, leaving to the proper tribunals to determine, as occasion may arise, what property passes by it. The will made by Mrs. Van Wert in June, 1849, ought therefore, notwithstanding her coverture, to be admitted to proof as a valid will, subject to the single reservation, whether I must so admit it alone, or in connection with the instrument executed in 1844.

The will of 1844 professes to be made in execution of a power. Such wills have a peculiar operation, working not only an execution of the power, but also in many respects partaking of the qualities of a will, and being subject to the same general rules of construction. (The *Duke of Marlborough* v. *Lord Godolphin*, 2 Vesey, Sen. 76; *Southby* v. *Stonehouse*, Ib. 610.) The same formalities are requisite to their valid execution, and they are to be proved in the same manner as an ordinary will. Where a power of appointment over personal property is to be exercised by will, it has long been the established usage of the English Court of Chancery not to receive any paper pur-

porting to be a testamentary execution of such a power, unless it be first admitted to probate. (*Jones* v. *Jones*, 3 Meriv. 161; *Douglas* v. *Cooper*, 3 M. & K. 378; *Stevens* v. *Bagwell*, 15 Vesey, 140, 153; 1 Jarman on Wills, 23.) The reason of the rule is, that, whether a paper be testamentary or not, is exclusively for the Ecclesiastical Courts to determine. Other tribunals may decide as to the effect and construction of a will, but its proof belongs to the Court of Probate. But the spiritual Court has nothing to do with the question, whether a will is a good execution of a power, or whether the alleged power authorize a will, or in fact exists at all. These are all matters beyond its jurisdiction. Though it may be convenient for the Probate Judge to have produced before him the instrument, containing the grant of the power under which the will is claimed to have been made, it is by no means necessary. *In Re Monday*, (1 Curt. 590), neither the settlement nor a copy of it was before the Court, and "there being no proof, the will was executed agreeably to the power;" the motion to admit it was rejected. In *Allen* v. *Bradshaw*, (1 Curt. 110), the Court held that, "It cannot grant Probate of the will of a married woman, when that fact appears, without requiring the production of the instrument under which she was not before entitled; and when it is satisfied that she has the *protestas testamenti*, the Court must then see that she has complied with the requisite formalities." These cases were decided in 1835 and 1837, and arose from an entire misconception of the principle intended to be sustained in *Turner* v. *Hughes*, where it became necessary to inquire into the testamentary execution of a power, in order to pronounce upon the revocation of a prior will by one of a subsequent date. *Turner* v. *Hughes*, (4 Hagg. 30), was decided in 1831; and it was not till 1846, that this variation from the old course of the Spiritual Courts was corrected. In *Barnes* v. *Vincent* this important point was fully considered, and it was held that the old and correct practice was for the Ecclesiastical Courts to pronounce merely on the testamentary character

of the paper, where a power was alleged, and "that the safest and most consistent course is to grant probate, wheresoever the paper professes to be made and executed under a power, and is made by one whose capacity and testamentary intention are clear, and no other objection occurs save those connected with the power," and thus to "leave the Court which has to deal with the rights under that instrument, to decide whether or not it is authorized by that power and by its execution." Lord Brougham delivered the opinion in this case, and proof of the will was decreed to be taken, "not looking at it, as if it were the execution of a power." (Notes of Cases in the Eccles. and Mar. Courts, Vol. 4, Supp. 21.) No inconvenience, it seems to me, can arise from this practice, if the probate in such cases be always limited, the decree declaring the instrument to be duly proved as a valid will, so far as it may be authorized by a valid power for that purpose. This leaves open every question, except such as are necessarily connected with the probate. *In the matter of Stewart*, (11 Paige, 399), I have dwelt on this point somewhat at length, as well from a desire to indicate the principles which should govern the Court in taking proof of a will executed under a power, as for the purpose of showing that the rule, as laid down in *Barnes* v. *Vincent*, does not comprehend such questions of construction as are necessarily involved in determining what is the last will, where there are several instruments, inconsistent with each other. There can be but one last will, and yet several papers in harmony with each other, may, when taken together, constitute the last will, and a Probate Court is constantly called upon to construe a will and codicils, or independent wills, in order to decide which have been revoked and which are existing testamentary dispositions. In *Spratt* v. *Harris*, (4 Hagg. 405), administration was granted with two testamentary papers annexed. In *Masterman* v. *Maberly*, (2 Hagg. 235), an unexecuted will and two bonds were all admitted to probate together. In *Sandford* v. *Vaughan*, an allegation propounding four papers, as to-

gether containing the last will, was admitted to proof, (1 Phil. 39, 128); and in *Harley* v. *Bagshaw*, five separate instruments were propounded, and three ultimately established as the last will. (2 Phil. 48, 313. See also *Richardson* v. *Barry*, 3 Hagg. 249; *Ingram* v. *Strong*, 2 Phil. 313.) It is undoubtedly the single duty of the Probate Court, in the language of Lord Brougham, "to take proof of the instruments claimed, and leave the construction to the proper tribunal," but to settle whether or not one will revokes another, frequently involves questions of construction of the most intricate character; and it becomes, therefore, an incidental but essential branch of jurisdiction to entertain and decide such propositions, otherwise it would often be impossible to exercise the undoubted right, and perform the imperative duty, of determining which is the last will. Now a will in execution of a power is ambulatory, and revokable like a proper will. (*Southby* v. *Stonehouse*, 2 Vesey, Sen. 611.) It is revoked by the same circumstances as an ordinary will, (*Cotter* v. *Sayer*, 2 P. Wms. 623; *Duke of Marlborough* v. *Lord Godolphin*, 2 Vesey, Sen. 75); and a question of revocation and construction may therefore just as well and properly arise in such a case, as in regard to a common will.

I proceed now to inquire, in the first place, whether the instrument executed by Mrs. Van Wert in 1844 was a valid will. The well recognised rule of Courts of law and equity, that where a will relates to personalty, it must be proved in the Spiritual Courts, has long been applied to an appointment by a *feme covert*, who could not strictly make a will. (*Ross* v. *Ewer*, 3 Atkyns, 160, 356; 2 Roper, Husband and Wife, 198.) Though formerly a contrary notion prevailed. (*Shardelow* v. *Naylor*, 1 Salk. 313.) Testamentary appointments by married women, under a power secured by some grant or devise, have always been held valid in respect to both real and personal estate. (*Langford* v. *Eyre*, 1 P. Wms. 741; *Wagstaff* v. *Wagstaff*, 2 Ibid, 358; *Pemberton* v. *Pemberton*, 13 Vesey, 297;

Hume v. *Rundell*, 6 Madd. 331; *Jenkins* v. *Whitehouse*, 1 Burr. 431; *Stone* v. *Forsyth*, Doug. 707; *Bradish* v. *Gibbs*, 3 John. Ch. 523; 2 Kent's Comm. 161, 171; 4 Ibid. 324.)

The revised statutes, however, expressly declare in terms, that a married woman may execute a power by devise, (1 R. S. 732, § 80, p. 735, § 116;) but subject to the limitation, that no power vested in a married woman, during her infancy, can be executed by her until she attains her full age, (1 R. S. p. 734, § 11.) The powers here referred to relate only to real estate; and as an infant cannot devise lands, it follows very clearly, that, whether viewed as a proper will, or as an appointment under a power, the instrument made by Mrs. Van Wert, in 1844, is utterly invalid as to real estate.

At common law, a *feme covert* might make a will of personal estate with the consent of her husband, but our statute has altered the rule and prohibited a will by a married woman of personal as well as of real estate; but this restriction does not extend to wills executed under powers. The Statute of Wills, (34 and 35 Henry VIII.), excepted married women, and yet, as is seen, testamentary appointments of real estate have always been sustained, and the common law rule has been incorporated into the revised statutes. "It is wholly impossible, therefore," says the late Chancellor, "to suppose that the Legislature could have intended to give to a *feme covert* the right to dispose of real estate by devise, in which she had a beneficial interest under a power, and to deprive her of the right to make a similar disposition of her personal property by will, where such property was held by trustees for her separate use, with power to appoint the same by will at her death." (*Strong* v. *Wilkin*, 1 Barbour, Ch. R. 9; *Moehring* v. *Mitchell*, Ib. 272.) It is true, the decedent was only twenty years of age, when she made the will of 1844; but at common law, males of the age of fourteen and females at the age of twelve were competent to make a will of personalty, and by our statute personal property may be

bequeathed by males at the age of eighteen, and unmarried females at the age of sixteen. The will of 1844, therefore, considered by itself, *was, as a testamentary appointment, valid* in respect to the *personalty*, and *invalid* as to the *realty;* the same result that was attained in *Duff* v. *Dalzell*, (1 Bro. C. C. 147.)

Was the will of 1844 revoked by the will of 1849? is the next question. By the introductory words of the will of 1849, Mrs. Van Wert declares in terms, that she revokes "all former will or wills" by her made. A revocatory clause is not always imperative, but its effect depends upon the intention to be gathered from both instruments. (*Denny* v. *Barton*, 2 Phil. 575.) The case of *Turner* v. *Hughes*, (4 Hagg. 30), to which I have already adverted in another connection, was similar in some respects to the present one. There the testatrix had a power of appointment, and in 1815 made a will executing the power, and afterwards, in 1829, made another will disposing of an estate over which the power extended, but without any recital of or reference to the power. The last will contained a clause revoking all former wills. The case was taken to the High Court of Delegates where it was held, after argument by the most distinguished counsel, that it was the duty of the Court of Probate to decide, whether the will of 1815 was revoked by the will of 1829, and to grant probate either of the will of 1829 alone, or of that and the will of 1815, with their codicils, as together containing the last will of the deceased. But the Court refused probate of both papers together, and admitted the will of 1829 alone, on the ground that, although the clause of revocation in the will of 1829, was not *per se* sufficient to revoke the first instrument, yet the contents of the will of 1829, taken altogether, clearly showed a departure from the original intention in 1815, and the first will was therefore revoked.

In endeavoring to ascertain the intention of the testatrix, I must not overlook the fact, that our statute has materially altered the rule as to the testamentary execution of a power.

By the common law, and previous to the act, 1 Victoria, c. 26, a general devise, however unlimited in its terms, did not operate as an appointment. To make a will take effect as an execution of a power, there must have been either an express reference to the power itself or to its subject, the property held under it. (1 Sugden on Powers, 386.) On the other hand, our statute declares (1 R. S. p. 737, § 124, 126), that every instrument executed by the grantee of a power, conveying an estate which the grantee could not convey unless by virtue of his power, shall be deemed a valid execution thereof, though the power be not recited or referred to; and lands embraced in a power to devise, shall pass by a will purporting to convey all the real property of the testator, unless the intent, that the will shall not operate as an execution of the power, shall appear expressly or by necessary implication. Now by the will of 1849, Mrs. Van Wert gives, in case she dies without issue, "all" her "real and personal property." Such a clause, the statute says, shall pass lands embraced in a power to devise, unless a contrary intent appear expressly or by necessary implication, which, however, is so far from being the case, that the other portions of the will go strongly to prove her intention to execute the power, instead of leading to the opposite notion. The real estate covered by the power, passing therefore by the will of 1849, it is inconceivable that the testatrix should have intended the personalty, constituting part of the mixed fund over which the power extended, to be governed by the will of 1844. Had the will of 1844 been duly executed, so as to pass real estate, it would have been revoked as to the realty by the will of 1849; the will of 1849 does, in fact, reach the lands embraced under the power; and I cannot suppose that it was the design of the testatrix, at the very moment she declared all former wills revoked, to have, by a rule of construction, an unascertained and undefined part of a fund go one way under one will, and another part go another way under another instrument. Nor do I think it unreasonable to apply the same rule, which

the Legislature have adopted for the construction of testamentary appointments in regard to real estate, to such appointments when they affect personal estate, and to hold that personalty covered by a power, shall pass by a bequest of "all the personal property," just the same as lands embraced in a power passed by a devise of "all the real estate." I think it would be a safe rule of construction, at least in cases where the estate was a single fund of a mixed character, and the design of the testator was evidently to pass the entire *corpus* unbroken.

It is not necessary, however, now to go to that extent, for it seems to me there are very decided evidences of intention, in the will of 1849, to dispose of the personal estate affected by the power. The clause of revocation being contained in the introduction to the will of 1849, conveys to my apprehension the idea, that the revocation of the will of 1844 was not an ordinary incidental formal act of the testatrix, but, contrariwise, was uppermost in her mind as a point of importance to be clearly understood, and not to be overlooked in making a new will. In the first article of the will she not only gives her husband "all her real and personal property," but adds, "*and* all real and personal property that has or may hereafter at any time come to me by right of heirship or otherwise by Pa's will." And again, in the second article, she proceeds to give to her husband "all her interest by right of heirship in the household property belonging to her father's estate, and all other property, of whatever name, nature or kind." These provisions, though inartificially drawn, leave no slight impression on the mind as to their meaning and design. If the testatrix had intended to pass only such property as she had a general right to dispose of, it would have been palpably unnecessary, after giving *all* her real and personal property, to allude, in such express, repeated, and comprehensive terms to her father's will, and all property which had or might thereafter come to her thereunder, in any way. This broad and sweeping language would abundantly satisfy the common law rule, now so much

narrower than that of our statute; and by its reference, first, to the will of her father, which gave the power, and, secondly, to the subject of the power, the property itself would, I think, be sustained as sufficiently explicit as respects both realty and personalty, to pass for a valid testamentary execution of the power, in all its length and breadth.

It is not unworthy of attention, also, in striving to reach the intention of the testatrix, that the contingency upon which the devise and bequest to her husband are made to take effect, — namely, her dying without issue, and which is carefully repeated in her will, — is the precise contingency upon which her right to dispose of the estate, over which her power extended, is limited by her father's will to take effect. This, it seems to me, is not an unimportant aid in determining what property she intended to reach by her will.

Again, it must not be forgotten, that, subsequent to the execution of the will of 1844, the Legislature had removed the disability of a married woman to make a will, so that there would not naturally be so formal and distinct a reference to the power, as when the right to make a will at all depended entirely on the power; and, also, the provisions of the Revised Statutes being such that a general devise of realty embraces lands covered by a power, would conduce likewise to a less explicit and definite reference to the power, so far as the real estate was concerned.

Taking all these circumstances into consideration, in connection with the introductory clause of express revocation, the fact that the will of 1844 was utterly invalid as to the real estate, and the manner in which the testatrix really seems to have struggled to express an intention to give every thing of which she had the power of disposition to her husband, — I cannot come to any other conclusion, than that the will of 1844, so far as it was duly executed, was revoked, and that the will of 1849 must be established as the last will and testament of the deceased, and a valid will of real and personal estate.

Recent English Decision.

Court of Chancery.

Heathcote *v.* The North Staffordshire Railway Co.

Equity — Specific Performance — Injunction — Parliament.

Upon a railway company applying to Parliament for an act to make a railway, a land owner opposed it; but upon the company covenanting by deed to endeavor to obtain an act to enable them to make a branch line to some property of the land owner, and to make the branch, the land owner withdrew his opposition to the bill, and entered into certain covenants on his part. The company obtained the act for making their original line, and the next session they obtained an act for making the branch line. The company were now about to apply for an act to enable them to abandon the making of the branch line. The land owner filed his bill against the company to compel specific performance of the contract to make the branch line, and for an injunction to restrain the application to Parliament, by the company, for the act to enable them to abandon the branch line: *Held*, dissolving the injunction which was granted by the Vice-Chancellor of England, that although this Court may, upon a proper case, interfere by injunction to restrain proceedings before Parliament, yet that it will not do so merely upon the ground that the act applied for would interfere with existing rights, which is only a ground for the party to be heard in opposition to the bill, and this whether the rights arise from property or contract.

Semble, there was a want of equity in this case, as this Court could not decree specific performance of a contract to make a railway.

This was a motion to discharge an order of the Vice-Chancellor of England, dated the 19th January last, and to dissolve an injunction thereby granted, whereby the above named company were restrained from presenting any petition, and from making or prosecuting any application, to Parliament for obtaining an act to authorize them to abandon or relinquish the Silverdale and Apedale Branch Railways, or either of them, or to authorize any thing to be done or omitted to be done by the company inconsistent with or repugnant to the covenant on the part of the company, contained in the indenture of the 10th October, 1846, in the pleadings mentioned, and from giving any notice or taking any proceedings required by the standing orders of either house of Parliament, to warrant the intro-

duction into or the progress through Parliament of any such act. (The case is reported ante, p. 73.) From the former report it will be seen, that when the Company introduced into Parliament a bill for the purpose of authorizing them to construct a branch railway out of their main line at Stoke-upon-Trent, in the county of Stafford, to Newcastle-under-Lyne and Silverdale, in the same county, and for that purpose to take and use, among other lands, part of a canal, called the Gresley Canal, belonging to the plaintiff, the plaintiff opposed the bill; but upon the Company and the plaintiff coming to an agreement, which was embodied in the indenture of the 10th October, 1846, the plaintiff withdrew his opposition to the bill, and covenanted to assist in obtaining an act for making the Apedale Branch, and, in the event of the Company not deeming it advisable to make use of the bed of the Gresley Canal as the site of the Apedale Branch within one week from the opening to the public of the Apedale Branch, to convey and assure to the Company so much of the canal as was therein specified. The inducement for the plaintiff to withdraw his opposition was the undertaking of the Company to construct a branch railway from the proposed Silverdale Branch to certain furnaces at Apedale belonging to the plaintiff, to be called the Apedale Branch Railway; and the Company undertook to apply in the next session of Parliament for an act to authorize them to make the Apedale Branch, which they accordingly did. The Company not having commenced the Apedale Branch, and only a small portion of the Silverdale Branch, when the time for taking land under their compulsory powers expired, the plaintiff filed his original bill, alleging that the construction by the Company of the Silverdale and Apedale Branches was the consideration which induced the plaintiff to execute the indenture of October, 1846, and to withdraw his opposition to the act authorizing the construction of the Company's main line; and praying, amongst other things, a declaration that the compulsory powers for taking land for the Silverdale Branch had expired on the 26th June, 1849; and that the Company

might be decreed specifically to perform the agreement on their part contained in the indenture, and with all practicable expedition to complete and open for use the Apedale Branch Railway, and also the Silverdale Branch Railway. The supplemental bill stated the fact of a notice by the Company of their intention to apply to Parliament for an act to authorize them to relinquish the formation of the Silverdale and Apedale Branch Railways, and prayed an injunction, in the terms of that granted by the Vice-Chancellor of England.

Bethell, *Malins*, and *Bovill*, in support of the appeal motion. — The agreement of October, 1846, proceeded upon the hypothesis, that we should make the Silverdale Branch. The powers for the construction of this branch were to expire on the 26th June, 1849, and yet until after that time the plaintiff took no steps to compel the Company to go on with that branch. The bill alleges that the Apedale Branch Railway, without the Silverdale Branch Railway, would be wholly useless; and yet the plaintiff, by his bill, asks it to be declared that we have no longer power to make the Silverdale Branch. The effect of this would be, that the agreement could not be performed; for the Apedale Branch was to start from the Silverdale Branch; and so the agreement would be defeated by the plaintiff's own conduct. The bill for which we are going to Parliament is a mere permissive one, and would not oblige us to abandon the lines; and it would not affect any liability on the contract. Upon the investigation of the title of the plaintiff, it turns out that he is not the absolute owner of the canal; and it further appears, from the Gresley Canal Act, (15 Geo. 3, c. xvi.) that it must always remain a canal, otherwise it reverts to the former owners; and by an agreement between Sir B. Gresley and the Newcastle-under-Lyne Canal Company, this canal must always be kept open as a feeder for that Company's canal. The plaintiff, therefore, is unable to perform his part of the contract; and where this is so, an injunction will not be granted to prevent the non-performance of the contract by the other

side. Where the Court cannot perform the entire agreement, it will not interfere. (*Dietrichsen* v. *Cabburn*, 2 Ph. 52; S. C., 10 Jur. 601.) This Court will not charge itself with the duty of making a railway; the ordinary jurisdiction in decrees for specific performance applies only to such matters as may be done, once for all, by the order of the Court; but any thing that requires the constant supervision of the Court is not a matter for specific performance by the Court. Another argument was used by us before the Vice-Chancellor, which was this — that notwithstanding the rule that you may restrain an individual from going to Parliament to oppose a line, a public company has never been restrained from going to Parliament. Again, as to the propriety of continuing or abandoning a line which was supposed to be of public use, the Apedale Branch Act recites, that the making the line would be of public use. The Vice-Chancellor says you shall not apply to Parliament to abandon that line. This point has never arisen before your lordship except incidentally. In the case of *The Attorney General* v. *The Leeds and Manchester Railway Co.*, (1 Railw. Cas. 436), your lordship declined to interfere with the right of going to Parliament; your lordship then corrected the notion, that a party could not be restrained from opposing an act of Parliament upon a private right. In *The Stockton and Hartlepool Railway Co.* v. *The Leeds and Thirsk Railway Co.*, (2 Ph. 670), your lordship said, that there was no question about the jurisdiction. In the present case, what is the use of the injunction? If the act should pass, it will not injure the plaintiff; for if there be an agreement, and the Court can enforce it, it will. The consequences of continuing the injunction may be very injurious.

R. Palmer, and *Amphlett*, contra. — Four grounds have been taken by the other side: first, that the conduct of the plaintiff has disentitled him to the assistance of the Court; secondly, that the plaintiff was unable to make a title to the canal; thirdly, that the agreement was one of which the Court could not decree specific performance; and, fourthly, that the Court would not grant an injunction

to restrain a railway company from going to Parliament. As to the first, the plaintiff says he has always been ready to treat for the premises required from him for making the Silverdale Branch; but he says that the Company contracted themselves out of the compulsory powers, or if not, that the compulsory powers have ceased; and that the value of the land cannot be assessed by summoning a jury under the Lands Clauses Act. On this point we succeeded in obtaining an injunction, on the 12th July, 1849, to restrain the Company from summoning a jury, but we were always ready to treat for the land. As to the second ground, *Dietrichsen* v. *Cabburn*, (*ubi sup.*) is an authority for our very contention; for there your lordship decided, that where the *Court*, not the *party*, could not specifically perform the entire contract, it would not interfere by injunction; yet that, if the party applying could perform his part of the contract, the Court will restrain the other side by injunction from breaking his part of the contract. (*The Great Western Railway Co.* v. *The Birmingham and Oxford Junction Railway Co.*, 5 Railw. Cas. 241; *Tulke* v. *Moxhay*, 2 Ph. 774; S. C. 13 Jur. 26, 89; *Storer* v. *The Great Western Railway Co.*, 2 Y. & C. C. C. 48.) And the present intended application to Parliament is a clear breach of the contract on the part of the Company. The plaintiff is ready to perform his part of the contract, and to convey such part of the canal to the Company as they may require. The other side say, that upon perusing the abstract, it appears that the plaintiff cannot convey the bed and site of the canal; but that is not the contract; the plaintiff is ready to convey it *modo et formâ*, as it exists under the acts of Parliament. There is no sound distinction between the jurisdiction of this Court in restraining a party from opposing a bill in Parliament, and restraining a party from promoting a bill in Parliament. The question of private right is involved in the one as much as in the other. They referred also to *Ware* v. *The Grand Junction Waterworks Co.*, (2 Russ. & M. 470); *Brocklebank* v. *The Whitehaven Junction*

Railway Co., (15 Sim. 632); *Price* v. *The Corporation of Penzance*, (4 Hare, 506); and *Cunliff* v. *The Manchester and Bolton Canal Co.*, (2 Russ. & M. 480, note.)

Bethell, in reply. — The object of these contradictory proceedings of the plaintiff is to oblige the Company to purchase the land at the land owner's price. The Vice-Chanceller overlooked the objection, that where the bill is filed for specific performance, and there is no equity for the performance of it, the injunction cannot be maintained. The agreement was not that the plaintiff would convey the canal, but only a portion of it from point A to point B. How, then, can it be contended that it was to be delivered up as a navigable canal? The object of the Company was to annihilate the canal. The performance of the agreement, therefore, of October, 1846, is shown to be impossible. If the decree in *Storer* v. *The Great Western Railway Co.*, was by consent, it has nothing to do with the present case; and if it was not, I submit that it is a very doubtful authority. The case of *The Great Western Railway Co.* v. *The Birmingham and Oxford Junction Railway Co.*, was not like the present; that case falls strictly within the principle of *The Stockton and Hartlepool Railway Co.* v. *The Leeds and Thirsk Railway Co.* [*Lord Chancellor.* — Every act of Parliament must interfere with some rights, and I do not see any distinction between a right at law and a right in equity; and if this Court were to say, that because a party has an interest that would be interfered with by the proposed bill, he has a right to restrain the promotion of the bill, it would be tantamount to saying that this Court would, in all cases, upon the application of a party whose rights might be affected, restrain the party promoting the bill.] That was precisely the argument your lordship used in *Ware* v. *The Grand Junction Waterworks Co.* I submit, therefore, that your Lordship will dissolve the injunction.

The Lord Chancellor (Cottenham) delivered out to the parties the following judgment, previously to resigning the Great Seal: — The injunction granted by the Vice-Chancel-

lor of England, and by this motion sought to be dissolved, in substance restrains the defendants from making any application to Parliament for obtaining any act authorizing them to abandon or relinquish the Silverdale and Apedale Branch Railways, or either of them, or to authorize any thing whatever to be done, or omitted to be done, inconsistent with, or repugnant to, the covenant contained in an indenture of the 10th October, 1846. By this covenant the defendants agreed with the plaintiff, that they would in the then next session of Parliament, apply for, and use their utmost endeavors to obtain a distinct and separate act, empowering and requiring them to make and construct a branch line of railway, commencing by a junction with the Company's Silverdale Branch, from the North Staffordshire Railway Pottery line, at or near to Newcastle-under-Lyne, and terminating at or near to the furnaces of Apedale; and that they would, with all practicable expedition, after such authority should have been obtained, complete and open for use the said Apedale Branch Railway, at their own expense in all things, and should forever thereafter maintain the same at the like expense. It will be observed that the proposed act was to authorize the making of the Apedale Branch: the authority for the Silverdale Branch had been obtained by an act of the session of 1846; but the Apedale Branch was to run into, and so in fact form one with, the Silverdale Branch. In 1847, an act for making the Apedale Branch was accordingly applied for and obtained, authorizing, but not otherwise requiring the Company to make such branch; but no part of it has ever been made. The supplemental bill states a notice, dated the 30th November, 1849, on the part of the defendants, sufficient for the purpose of an injunction, to show an intention of applying to Parliament for an act to authorize them to relinquish the formation of the Silverdale and Apedale Branches; and the question is, first, whether this Court has jurisdiction to interfere by injunction to prevent such application to Parliament; and, secondly, if it has, whether a proper case is made for the purpose. Upon the first it has been suggested, that this

Court could not interfere without infringing upon the privileges of Parliament. So the Courts of common law thought at one time; and there is as much foundation for the one as for the other supposition. In both cases, this Court acts upon the person, and not upon the jurisdiction. In a proper case, therefore, I have said here and elsewhere, that I should not hesitate to exercise the jurisdiction of this Court by injunction, touching proceedings in Parliament for a private bill, or a bill respecting property; but what would be a proper case for that purpose it may be very difficult to conceive. The case of Parliament differs widely from that of the Courts of common law; the province of the latter is to enforce legal rights, and the object of the injunction is to prevent an inequitable use of such legal rights; but the ordinary province of Parliament in such bills, is to abrogate existing rights, and to create new ones. To hold, therefore, that no application should be made to Parliament, because the object of the application was to interfere with some right or interest of some other party, would be in effect to hold that this Court should, by its injunction, deprive the subject of the benefit of parliamentary interference in all such cases. In many settlements there is a want of some power, essential to the proper management of the property, and Parliament is in the habit of exercising its discretion in supplying the defect; but if any party interested, could obtain an injunction against such proceeding upon this ground, that what was proposed would interfere with his estate and interest, Parliament would have no opportunity of exercising its discretion. So in railway acts, every owner in the line of the intended railway, has an interest in the exercise of the powers asked: the promoters of the bill ask for powers to interfere with their interest, and to take land which the owners may be most anxious to retain; but it has never been suggested that the Court could interfere by injunction, to prevent the promoters from prosecuting such bill. The injunction, therefore, cannot be granted upon the ground that the act applied for would interfere with existing rights,

it being the very object of it to do so. What difference, then, can it make, whether such pre-existing rights exist by the tenure of property, or by virtue of contract? In both cases Parliament has the same power of destroying, altering, or affecting such pre-existing rights, providing, as it always does, or intends to do, compensation to the party affected; and in neither has this Court a right to interfere, by injunction, to deprive the subject of the right of applying to Parliament for a special law to supersede the rules of property by which he finds himself bound, whether arising from contract or otherwise. It is also to be observed, that the contract which the plaintiff seeks to preserve, is one which this Court cannot specifically perform; it cannot decree the Company to make the two branches in question; but they — having obtained power to make them, and having covenanted to make and maintain the Apedale Branch, in which the plaintiff has an interest, and neglecting or refusing to perform such covenant — may be liable at law for such neglect or refusal; and to enforce such liability, is the whole of the right the plaintiff can have under this covenant. But does that which the plaintiff alleges the defendants are seeking to obtain from Parliament, interfere with such right? The object of the application to Parliament is to authorize the Company to relinquish the formation of those two branches, and not to relieve them from liability to any contracts they may have entered into, in contemplation of making them. Suppose they had agreed for the purchase of land in the line of the Apedale Branch. Relinquishing the formation of the line, they may still be liable to complete the purchase; and could the owner obtain an injunction to prevent the defendants obtaining an act to authorize such relinquishment? It is well known, that after companies have involved themselves in all the difficulties and liabilities incident to undertakings, the aid of Parliament, or of some authority derived from Parliament, is frequently necessary to extricate them; but this does not necessarily extend to protecting them against liability to contracts they may have entered into. It is not

alleged in the supplemental bill, that such is intended to be the object of the act applied for; and if it were, it would only show that the plaintiff has an interest in the subject-matter of the petition to Parliament, which would probably entitle him to be heard upon it. The covenant is a merely legal contract, which the act asked for, may prevent the defendants from performing; but that is all. If A. contract with B. to deliver goods at a certain time and place, will equity interfere to prevent A. from doing any thing which may or can prevent him from so delivering the goods? If, indeed, A. had agreed to sell an estate to B., and then proposed to deal with the estate so as to prevent him from performing his contract, equity would interfere, because in that case B. would, by the contract, have obtained an interest in the estate itself, which, in the case of the goods, he would not. Independently, therefore, of the objection that the injunction restrains an application to Parliament for a purpose which the plaintiff has no right to control, there is, I think, a want of equity arising from the nature of the contract itself; and I am therefore of opinion, that the injunction ought to be dissolved, and the motion before the Vice-Chancellor refused, with costs.—*Injunction dissolved.*

Upon the application of Mr. Bethell, which was not opposed by the other side, the Lord Chancellor permitted the Company to give certain notices, for the purpose of complying with the Standing Orders of the Houses of Parliament, this being the last day for giving such notices for the present session.

Abstracts of Recent American Decisions.

Supreme Court of Pennsylvania — May Term, 1850.

AT HARRISBURG.

[Reported for the American Law Journal, by P. C. Sedgwick, Esq.]

Pennell v. *Grubb, as garnishee of Pennell.* Error to Lancaster. Gibson, C. J. A garnishee has the same right of set-off of claims owing to

him by the defendant in the proceedings, as any other defendant; and the *onus* as to the time the right accrued, will lie upon the party claiming it. There is no presumption in the case; and a garnishee may not set off a cross demand without proving that it was acquired before the attachment was laid. Judgment reversed.

McAninch v. *Laughlin*. Error to Huntingdon. GIBSON, C. J. When the facts are within the knowledge of both parties, and the mistake was in the judgment they formed of the legal effect of them, equity affords no relief. Judgment reversed.

Kymer v. *Shower*. Error to Cumberland. GIBSON, C. J. When a person, who is neither maker, drawer, payee or acceptor, puts his name on commercial paper before it is negotiated, he means to give credit to it as an original promissor; but whether as a surety absolutely bound, or as a guarantor, contingently, depends upon circumstances. The character of his obligation may be shown by extrinsic proof; but when there is no proof, he authorizes the payee to write over his name any form of engagement he may see proper.

In this case, the defendant below indorsed after maturity, with one Smith, and as there was no proof of terms, the holder might at the trial have filled the blank with a joint and several promissory note, payable to order, which would have passed to the plaintiff as indorsee, and sustained the action, which was so brought, and not by payee, *for use*, *&c.* But the action, so brought, is sustainable in another aspect. The payee, having a *carte blanche*, was authorized to place the names after his own in a course of indorsement; and that would have entitled a holder, whether for value or not, to maintain an action against either of the signers as prior indorsers. It is not necessary to join the other indorser after protest, and make a joint suit. Judgment affirmed.

Goodyear v. *Rumbaugh and wife*. Error to Perry. ROGERS, J. By the passage of the act of 1848, property belonging to a *feme covert* before its passage, or afterwards acquired, is hers absolutely, and she cannot be divested of it by any act of her husband, without her express assent. In this case the money belonged to the wife, and she loaned it. The husband cannot, by any agreement, release its payment to her, so as to bar a suit in her name for its recovery.

The proper construction of that act is, that property so owned, or acquired, belongs to the wife, as though she were a *feme sole;* and she cannot be deprived of it, either by the husband or any other person, without her express consent. Any other construction would deprive her of the protection the Legislature intended to afford her.

Nor can the defendant complain that suit is brought in the name of the husband and wife. It is for his advantage to have both for costs, instead of the wife alone. But suit may be brought in her own name, without joining the husband; or, according to circumstances, may be jointly brought. But in no case can the husband alone bring suit to recover the property, or for injuries done to it. The act is so just and remedial, that a construction will be put upon it so as not to trammel it, but to carry out the intent of the Legislature.

In what way her assent may be signified to a reduction by the husband, so as to bar her right, not determined in this case. Judgment affirmed.

Todd v. *Maffit.* Error to Juniata. *Per Curiam.* The plaintiff had judgment against him on a case stated in the former *scire facias*, and never can maintain another *scire facias*, any more than a plaintiff in an original writ can maintain another action after final judgment against him. Judgment affirmed.

Reed's Appeal. From the C. P. of Perry. GIBSON, C. J. A. purchased land, and paid part of the purchase-money, and, at his request, the title for the same was made to B., who gave a judgment to the vendor for the unpaid purchase-money, on which judgment the land was subsequently sold. A., the *cestui que use*, or his judgment creditors, are entitled to the balance of the proceeds of sale, in preference to the judgment creditors of B., who held the legal title. Decree affirmed.

Mr. Justice COULTER dissented. Judge C. held that no encouragement should be given to private equities and secret liens; and that the creditors of those who hold the legal title on the records, and who have given trust in consequence, ought to be protected.

Dale v. *Executor of Dale.* Error to Cumberland. ROGERS, J. Where the words of a will were, "That the proceeds of the sale of my real estate shall be loaned out, so that my wife may get the proceeds annually, so long as she shall remain my widow, for the support of herself and my daughter; and if at any time she should marry, then, and in that case, *my whole property, principal and interest*, to go to my child:" *Held*, that the words "my whole property," although used in connection with the realty, are sufficiently comprehensive to embrace the whole estate, of whatever descriptions, whether real or personal, and may be construed as a gift by implication of the personal estate to his wife during widowhood, although not expressly named. Judgment reversed, and judgment for plaintiff.

Topley's Appeal. From the C. P. of Perry. ROGERS, J. Where a writ of *scire facias* to revive the lien of a judgment had issued, and subsequently an amicable revival was agreed upon, but by a mistake of the Prothonotary, was not entered to the old suit: *Held*, that unlike the case of Meason's estate, (4 W. 341,) the old *scire facias* would not be considered as abandoned, but as still open and pending, and the mistake of the Prothonotary ought to work no injury to any one, especially as no one was misled; and that the right entry might be made *nunc pro tunc*. Decree reversed.

Roland v. *Long.* Error to Perry. ROGERS, J. The defendant obtained a descriptive warrant for the land in dispute, prior to the plaintiff's warrant, paid the purchase-money to the Commonwealth, had a survey made by deputy surveyor in due and proper time, and the only defect in his title was, that the deputy surveyor had failed to make a return of the survey to the land office; and the knowledge of all these facts was known by the plaintiff, the subsequent warrantee, for many years: *Held*, that the neglect of the deputy surveyor, and the inattention to it by the

defendant, will not be construed as a legal abandonment, but that the question was properly left to the jury as to his intention to abandon, so as to justify the plaintiff in taking out a warrant for the same land. The Court would have been justified in charging, that there was no proof whatever from which the jury could find an abandonment.

The knowledge of the plaintiff of these facts which constitute an equitable title, supersedes the necessity of formal notice. And the proof of these facts by the deputy surveyor, with the fact that he sent the return to the land office and paid the fees over for making and returning the survey, was admissible, not to prove a return, but on the question of diligence and attention of the defendant, — on the question of abandonment. Judgment affirmed.

In re Darlington's Appropriation. Appeal from C. P. of Perry. Bell, J. A voluntary parol partition by heirs when lines are marked, and possession taken, is efficacious and binding, and cannot be contested afterwards. A husband may compel partition of his wife's interest in an estate without her assent, and when equal partition cannot be made, the interest of the *feme* is turned into money by way of owelty, and so might be reduced to possession by the husband, before the late acts. As these parties did no more than they might have been coerced to do, their acts are binding, though one of them was under coverture, and another a minor.

Especially, mere strangers cannot object, — such as judgment creditors. The owelty is the superior lien to be paid before the creditors, of one to whom the purpart was assigned. They must be supposed to have had knowledge of this incumbrance. Decree affirmed.

Assignees of Klap v. *Shirk.* Error to Lebanon. Rogers, J. An assignment for the benefit of creditors under our act, regularly made, and the provisions of the act complied with, is not avoided because the property assigned was left in the possession of the assignor. Nor does such make the assignment *per se* fraudulent. To avoid a deed of assignment, in such case, the fraud must be in the arrangement of the transaction — in the assignment itself. No subsequent fraudulent dealing between the assignor and the assignees can re-invest the goods assigned in the assignor, or have a retrospective effect so as to avoid the assignment itself.

It was error for the Court to instruct the jury that they should not hold the assignment fraudulent, "on slight grounds, and that there was but little evidence here," when in fact there was *no evidence* of fraud in the assignment; that all the improper conduct complained of, took place after the assignment was made.

If assignees allow the assignor to hold six or seven times more than the law allows him, of the assigned property, the vigilant creditor who levies upon it will not be allowed to hold as against the general creditors under the assignment. No fraud subsequent to the assignment can divest their right of looking to the property, when the rights of *bonâ fide* purchasers do not intervene. Judgment reversed; and a *venire de novo* awarded.

Westenburger et al. v. *Reist et al.* Error to Lebanon. BELL, J. A deed and article of agreement executed the same day, must be taken together as constituting the muniment of title.

The words of the grant from Reist were "to Barbara Bomberger, her heirs and the assignees of her heirs to the only proper use and benefit of her, the said Barbara Bomberger, her heirs, and the assigns of her heirs forever;" qualified immediately as follows: "under and subject to a certain article of agreement, bearing even date with this present indenture," "subject as aforesaid." The stipulation in the article was as follows: "And the said Christian Bomberger and Barbara his wife, for themselves, their heirs, executors and administrators, do covenant, promise and grant, to and with the said Abraham Reist, his heirs, executors and administrators, that if the decease of the said Barbara should take place, and she not leave lawful issue, or issues that would live to the age of twenty-one years, then the premises as herein before mentioned, agreed upon to be conveyed to her, shall then descend and come to the heirs of her said father, Abraham Reist, or their legal representatives, and the indenture by which these premises are granted to the said Barbara shall cease, determine and become absolutely void to all intents and purposes whatsoever; but if otherwise, and she should have issue as aforesaid, the said indenture shall be valid, &c." The question was, whether Barbara took a fee conditional, or a fee tail, or an estate for life with a contingent limitation to such of her children as should attain the age of twenty-one years. *Held*, the latter by the Court below, and by the Supreme Court. She took a fee simple on condition of having children who should attain to full age. Having failed in this, her estate was determined by her death, and a fee vested in the heirs of the grantor.

Eyrick et al. v. *Hetrich.* Error to Berks. BELL, J. In this case the father being security for a son who was becoming insolvent, made a deed of an estate in trust for the said son, to another lunatic son, as a trustee. The creditors of the *cestui que trust* obtained judgment, sold at sheriff's sale, got possession, and this suit was brought by the trustee to recover the land. The property was not sold as the father's at all. *Held*, that the fact, that the conveyance was made in trust for the special purpose of keeping creditors at bay makes not against its validity so far as the son is concerned, for neither policy or equity prohibits a parent to make provision for the maintenance of an insolvent child. It would have been otherwise had the creditors of the father attempted to impeach it. It was not attached as his — not sold as his; and by attacking the title of John, the *cestui que trust*, they attack their own title. By selling it as his, they stand in his shoes. The evidence offered on this point not admissible.

Nor can the defendants show for the same reason, that the trustee was *non compos*, and therefore incapable of accepting the deed. This would destroy their own title; as they hold by sheriff's sale of his title.

But the impeached deed has been of record more than a quarter of a century, and the *cestui que trust* in possession in accordance with it. This would prove the delivery and acceptance of the deed. A deed may be

made to one bereft of reason, and he will take as a purchaser, in his own right — so he can take the legal title for the benefit of another. And a delivery to the *cestui que trust* himself will answer the purpose. Chancery would not permit the trust to fall, for want of a trustee. This trustee is a mere conduit-pipe for the transmission of a beneficent intent. Judgment affirmed.

Reagan v. *The administrators of Grim.* Error to Berks. ROGERS, J. This was an action on the case for a nuisance for flooding the lands of the plaintiff, and throwing the water back on the wheel of his mill. The plaintiff, at the trial, offered to prove that whilst the jury were viewing the damages of the water complained of, above the defendant's mill and dam, Henry Grim, one of the administrators and children of the defendant, Robert Grim, who died intestate, privately ordered his brother or brothers, also heirs, to raise the mill-gates and lower the water, and they did it, saying, "*This won't do, the dam is getting too high.*" This evidence was excepted to, and the Court admitted so much of it as showed the drawing off of the water during the time the jury were on the ground, and overruled the residue.

The plaintiff then offered to prove that Daniel Grim, one of the heirs of Reuben Grim, deceased, raised the gates of the grist-mill, and that another of the heirs raised the gate of the other mill, whilst the jury were viewing the premises, and let the water off by both gates — which was overruled and exception taken.

The admissions in these offers were admissible, although not made by a party to the suit, and named on the record because the heirs are *substantially* parties to the suit; and admissible, though the verdict and judgment would not be evidence in another suit involving the same right, to which the heirs might be parties. After extensive reasoning, the learned Judge concludes that both questions ought to have been allowed. Judgment reversed, and a *venire facias de novo* awarded.

Seibert's Appeal. From the Orphan's Court of Berks. ROGERS, J. A bequest to a married daughter for her sole and separate use, with a further clause, "And it is my further will, that after the decease of my daughter, Margaret, the one third shall be divided among her children, share and share alike, *when* they arrive at the age of twenty-one; but in case the said Margaret should not have any lawful issue or children, and *living then*, in that case the remaining one third shall descend to her two sisters," will be held to be a contingent legacy for the purpose of carrying out the general design of the will, to exclude the husband of Margaret from any benefit from it. The word "when" above is to be read "as". Decree reversed.

Cathcart's Appeal. From the C. P. of Perry. BELL, J. Where purchasers of real estate undertook to pay the prior liens upon it against the vendor, these liens will be entitled to be paid out of the proceeds of a sheriff's sale, in preference to the lien of the purchase-money, without proof that the executions which were issued on these prior liens were actually levied on personal property, and thus satisfied. But if there was

such a levy, Cathcart, the vendor, and in effect, surety for the prior liens, will not be entitled to claim on his lien for the unpaid purchase-money, as he has no equity against the holder of the original liens. Decree affirmed.

Porter v. *Wilson and Kelly.* Error to Dauphin. ROGERS, J. This was an action on a promissory note, purporting to be drawn by Holland and Porter, in favor of the plaintiffs below, Wilson and Kelly. The signature is in the handwriting of Holland alone. The writ was served on Porter alone, *nihil* as to Holland.

The defence was, that there was no partnership; and if there was one, it was for coaling purposes alone, and that the note was not given for a partnership debt. The plaintiffs offered in evidence a paper purporting to be a *copy* of an article of copartnership agreement, dated March 6, 1847, between Holland and Porter. The evidence was objected to, and admitted, and this was the first error assigned.

Before evidence can be given of the contents of a written paper, it is indispensable to prove, first, the existence and execution of the original; next, positive proof of its destruction, or of diligent search, and that it cannot be found.

Here there was not legal and competent proof of the existence and execution of the original. The witness marked on the copy stated that he was in the employment of the defendants, that he knew there were writings between them, but whether there were articles of copartnership he could not say. He thinks it probable he witnessed such writings, but cannot recollect distinctly of signing them as a witness, &c. This is too vague and shadowy as to the execution; and he does not know whether the paper is a copy or not.

Sterling, another witness, in his deposition, states, that he took the copy of the article in question, in the spring of 1847, at which time he had not seen Porter write, or any paper except the article which purported to be written by him, that his impression of its being Porter's was derived from Holland. Holland was then in insolvent circumstances, and exhibited the article to get credit at the bank, of which deponent was a clerk. After-acquired knowledge of handwriting, will in no case enable a witness to prove a signature to a *lost* instrument. The distinction is between proof of a *lost* instrument, and proof of a paper produced, and under the inspection of the witness. In the former stringent proof is required, and the knowledge of the handwriting must have been possessed *at the time* he saw it. It was error to admit this witnesss to swear to his belief, that the signature to the article he had seen two years before he testified was Porter's, at which time he had no knowledge on which to found a belief, whatever knowledge as to his handwriting he may have since acquired; and in this case it would not be sufficient to enable him to state a belief of the handwriting to a paper before him.

But in this case the copy ought to have been excluded, because the loss of the original was not sufficiently proved. The deposition of Holland, proving the original to have been in his possession, that it could not

be found, diligent search made, &c., was taken more than a year before the trial. Had he proved its destruction, this would have been sufficient; but it is only pretended to have been lost or mislaid. A search since, and about the time of the trial, may have found it, and it may have actually come to light since.

There was also error in admitting this deposition of Holland to go to the jury. He was interested in throwing off one half of his debts upon Porter.

Judgment reversed, and a *venire de novo* awarded.

Supreme Court of Maine.

When the authority given to a corporation is to *boom* lumber and receive toll therefor, it is not entitled to demand toll for *driving* lumber, that sort of business not being within its corporate powers. *Bangor Boom Corporation* v. *Whiting*.

In a suit by such corporation, upon an account annexed for *driving* and *booming* lumber, it is rightful to allow the plaintiffs to amend by withdrawing the charge for the *driving*. *Ibid.*

Payments to a person, acting as agent for such a corporation, made partly to pay for *driving* and partly for *booming*, are to be applied to each, according to the intent of the parties when the payments were made. *Ibid.*

If the doings of such an agent are some of them *within* and some of them *beyond* the corporate powers, the corporation may ratify his doings so far as they were within its powers, but no further. *Ibid.*

In a bond conditioned to convey land upon the payment of a note, time is not considered, *in equity*, to be of the essence of the contract, unless the parties have expressly agreed that it shall be so regarded, or unless it follows from the nature and purposes of the contract. *Jones* v. *Robbins*.

Generally, in such contracts, the time of payment is regarded in equity as formal, and as meaning only that the purchase shall be completed within a reasonable time, and substantially, according to the contract, regard being had to all the circumstances. *Ibid.*

Time is not made of the essence of such a bond, by inserting in it a clause that, "In case the obligee shall neglect or refuse to pay the note according to its tenor, the bond shall be void." *Ibid.*

In such a case, a delay to pay the note was excused by proof that the obligee was intending to pay it, but that, before and at, and a few weeks after the pay-day, he was prevented by sickness from attending to any business affairs, and that, upon his recovery, he sought permission of the obligor to pay it. *Ibid.*

In such a case, it having appeared that the obligor had determined to insist upon the forfeiture, as soon as the pay-day of the note had expired, and that, therefore, no subsequent tender would have been accepted, it

was decreed that he should convey the land, a tender having been made prior to the suit. *Ibid.*

Any illegality in the transfer of a negotiable note, will vitiate the title of one, who was a party to the illegality. *Sproule* v. *Merrill.*

If there be a series of conveyances with warranty running with the land, and the warranty be broken, the remedy belongs to him, during whose ownership or claim of ownership, under the conveyances, the warranty is broken. *Crooker* v. *Jewell.*

One of the grantees in such a series can have no action against his grantor for a breach of the warranty, occurring after having himself conveyed the land. *Ibid.*

In an action for the land, by one claiming under a paramount title, if the tenant vouch his immediate warrantors, who take upon themselves the defence, their release of a previous warrantor will not render such previous warrantor a competent witness for the defence. *Ibid.*

The act of the tenant, in vouching his *immediate* warrantors, does not impair his remedy against a *previous* warrantor. *Ibid.*

Where A., an inhabitant of this State, performed labor in New Brunswick, for B., who was an inhabitant of that Province, and C., who was an inhabitant of that Province, received means from B., for the purpose of paying the claims of A. and others; his undertaking is to be performed in that Province. *Very* v. *McHenry.*

The bankrupt laws of another country cannot govern our Courts, in regard to contracts made there, excepting from a principle of comity, extending the right to other nations, which it demands and exercises for itself.

But where it is manifest, that the foreign bankrupt law was not intended to have effect beyond the jurisdiction of the government, where it was made, the Courts of another government cannot give it an operation beyond the purposes of its authors. *Ibid.*

Nor would the Court regard such a law, if it should make an unjust discrimination between the foreign and domestic creditor. *Ibid.*

A certificate of discharge in bankruptcy, from the contract, according to the law of the place where it is made, and where it is to be performed, is a legal bar to an action in this State, though the plaintiff is, and ever has been, one of its citizens. *Ibid.*

And such certificate, under the bankrupt law of New Brunswick, will be a bar to an action on the contract, though the defendant acted originally in a fiduciary character. *Ibid.*

A contract may be avoided by proof of defendant's insanity at the time of contracting. *Thornton* v. *Appleton.*

For such purpose, the proof may be offered by the defendant himself. *Ibid.*

In an action upon a note, between the original parties, a partial failure or consideration, though the amount of it be unliquidated, may be proved by the defendant in mitigation of damage. And the jury, upon the evidence, may determine the amount of the failure. *Herbert* v. *Ford.*

The tendency of decisions in this country has been to allow a broader latitude of defence, than was permitted by the rules of the common law, to bills of exchange and promissory notes, where the justice of the case requires it, and a circuity of action may thereby be avoided. Per WELLS, J. *Ibid.*

In a suit upon an unnegotiable note, made payable to the plaintiff for the benefit of a third person, who still remains the owner, the same defence may be set up, as if the note had been made payable to such third person. *Ibid.*

For, in order to make this defence, is it necessary that the party, who sets it up, should restore what he had received under the contract? *Ibid.*

Counsel will not be permitted to argue to the jury, that the note before them was payable, according to the agreement of the maker, at a different place, than is indicated by the note itself. *Pierce* v. *Whitney.*

In an action against the indorser, evidence that the maker of a note addressed a letter to the holder, informing him that he should not be able to pay it at maturity, and requesting an extension, is not admissible to excuse a presentment of the note at the maker's place of residence and business, at its maturity. *Ibid.*

The parties to a note, deposited in a bank in Boston for collection, cannot be affected by an usage in the other banks, which has no existence in the bank where it is lodged. *Ibid.*

If one, without consent of the maker, affix his name, as subscribing witness to a note which had been executed without attestation, it is a material alteration of the note. Per HOWARD, J. *Thornton* v. *Appleton.*

But such alteration will not vitiate the note, if done without intention to defraud. Per HOWARD, J. *Ibid.*

A receipt not under seal, cannot be regarded as a release of the covenants in a deed which is not apparently referred to in the receipt; for "covenant by deed must be discharged by deed." *Heath* v. *Whidden.*

If, pending a suit in which land had been attached, the plaintiff assign the demand for value, the equitable estate, after the levy, is in the assignee, as a resulting trust. *Warren* v. *Ireland.*

In the making of such a levy, if the assignment be stated in the appraisers' certificate, such statement is notice of the trust to any attaching creditor of the assignor. *Ibid.*

Whether such creditor, without notice, actual or implied, could, by levying the land as the property of the assignor, hold it discharged of the trust; *quære.* *Ibid.*

But with such notice, he could hold only subject to the trust, and could not maintain a writ of entry against the grantees of the *cestui que trust.* *Ibid.*

Where a plan of a tract of land is made, with intent to represent a survey actually made and marked upon the face of the earth, if there be a variance between the survey and the plan, the plan is controlled by the survey. *Williams* v. *Spaulding.*

In such a case, conveyances made of lots according to the plan must yield to conveyances of lots according to the survey. *Ibid.*

One who sells a promissory note by delivery, upon which the names of indorsers have been forged, is not liable upon an *implied* promise, to refund the money received therefor, if he sold the same as property, and not in payment of a debt, and if he did not know of the forgery. *Baxter* v. *Duren.*

In an action by the purchaser against the seller of such a note, *so sold*, the broker, through whom the sale was negotiated, is a competent witness for the plaintiff if he was ignorant of the forgery, and if he did not make himself liable by any promise or representation concerning the note. For, in such case, he would not be liable to the plaintiff, and would have no interest that the plaintiff should recover. *Ibid.*

Any one dealing with a person whom he knows to be a broker, may be presumed to know, from the nature of a broker's business, that he is acting as agent for some third person. Per SHEPLEY, C. J. *Ibid.*

Miscellaneous Intelligence.

LAW OF PRINCIPAL AND AGENT. — We have trespassed somewhat on the patience of our readers, in placing before them the recent English and Ohio decisions upon the question of the liability of a principal for the negligence of an agent, by which another agent suffers. We take the liberty once more to call attention to the subject, by republishing from the London Jurist the following comment on the state of the law : —

"The Court of Exchequer has recently decided, in two cases, that a master is not liable to an action, at the suit of his servant, for injuries sustained in consequence of the negligence of a fellow-servant, while they are both acting in the master's service. The rule is, however, qualified to this extent, that unless the servant causing the injury be a person of ordinary skill and care, the master will be liable.

"In both cases the actions were brought, under Lord Campbell's Act (9 & 10 Vict. c. 93), by the representatives of the servants whose deaths had been occasioned by the negligence of their fellow-servants. In one (*Hutchinson* v. *The York, Newcastle, and Berwick Railway Co.*, 14 Jur. part 1, pp. 837, 840), the declaration stated that J. H. was in the service of the defendants, and that, in the discharge of his duty as such servant, he became a passenger upon the railway of the defendants, in a carriage drawn by an engine under the direction of the defendants' servants, and that another engine upon the same railway, under the direction of the defendants' servants, was so negligently driven as to come into collision with the said carriage, whereby J. H. was killed. The defendants pleaded, that the collision took place through the negligence of their ser-

vants, who were fit and competent persons; and the negligence was wholly unauthorized by the defendants, and was without their leave, license, or knowledge. Upon special demurrer it was held, that no cause of action was shown upon the record.

"In the second case (*Wigmore* v. *Jay*, 14 Jur. part 1, pp. 837, 838, 841), the defendant was a builder, employed to build a wing to the hall of the London University, and the deceased, who was at work there for him, was killed by the fall of some scaffolding, which had been erected by persons of competent skill in the employment of his master. The action was held not to be maintainable. The Court recognised the authority of *Priestley* v. *Fowler* (3 M. & W. 1), where the plaintiff was a servant of the defendant, and had sustained an injury by a fellow-servant having overloaded a van, in which the plaintiff was travelling, by the direction of the defendant, in discharge of his ordinary duties. The Court, after verdict for the plaintiff, arrested the judgment, upon the ground that a master is not, in general, liable to one servant for damage resulting from the negligence of another.

"It was admitted in all these cases, that if the party injured had been a stranger instead of a servant, he would have had a remedy against the master. The distinction is not at first sight obvious, inasmuch as the servant has no control over the employment of his fellow-servants; but this objection seems to be met by the qualification requiring the persons employed to be of ordinary skill and care. And when we consider the ground upon which the judgment of the Court proceeded, namely, upon the contract of hiring between the employer and the employed, the difference between such a case, and that of a stranger injured by the negligence of a servant, becomes at once apparent. The Court treated the risk of injury, arising from or connected with the employment, as a part of the service, and held that the servant must be supposed to have contracted on the terms, that, as between himself and his master, he would run that risk. 'The principle is,' said Alderson, B., in delivering judgment, 'that a servant, when he engages to serve a master, undertakes, as between himself and his master, to run all the ordinary risks of the service, and this includes the risk of negligence upon the part of a fellow-servant, when he is acting in the discharge of his duty as servant of him who is the common master of both.' But, as we have seen, the servant causing the injury must be a person of ordinary care and skill. 'The servant, when he engages to run the risks of his service, including those arising from the negligence of fellow-servants, has a right to understand that the master has taken reasonable care to protect him from risk, by associating him only with persons of ordinary skill and care.' And the master will not be exempt from responsibility to his servant for an injury occasioned to him by the act of another servant, where the servant injured was not at the time of the injury acting in the service of his master. 'In such a case, the servant injured is substantially a stranger, and entitled to all the privileges he would have had if he had not been a servant.'

"The principle, therefore, to be deduced from these decisions is, that a

master is not responsible to his servant for an injury sustained by such servant in consequence of the negligence of a fellow-servant, provided the servant injured was at the time acting in his master's service, and the servant causing the injury was a person of ordinary skill and care."

"In our last number we considered the subject of negligence, as between servants and their masters; we now propose to investigate some of the rules of law that relate to negligence as between strangers. Actions for this cause are often defended upon the ground that the plaintiff himself contributed to the injury of which he complains; and it becomes important to consider the effect of such contribution. The question has been complicated by the use of the word 'injury,' which has been indiscriminately applied to the accident and to its consequences. It is essential, however, to a right understanding of this branch of law, clearly to distinguish between the two, as upon this distinction depends the responsibility or non-responsibility of the party sought to be charged.

"The principle to be deduced from the decisions is, that if a party contribute in any degree to the immediate cause of the mischief, he cannot complain of the injury that may ensue, but he may recover if he only increase the amount of the injury, or the injurious consequences. As was said by Coleridge, J., in *Sills* v. *Brown*, (9 Car. & P. 601), 'The question is, whether the plaintiff, by his negligence, substantially contributed to the *occurrence* of the injury, not to the *amount* of it.'

"The first portion of the above principle is generally submitted to the jury in these terms — whether the plaintiff, by the exercise of proper care and skill, might have avoided the consequences of the other party's negligence. If so, he cannot maintain an action. (See *Butterfield* v. *Forrester*, 11 East, 60; *Thorogood* v. *Bryan*, 18 L. J., C. P., 336; and *Bridge* v. *The Grand Junction Railway Company*, 3 M. & W. 244.)

"In *Davies* v. *Mann* (10 M. & W. 546), the defendant negligently drove his horses and wagon against, and killed, an ass, which had been left in the highway fettered in the fore feet, and thus unable to get out of the way of the defendant's waggon; and the jury were held to be properly directed, that although it was illegal on the part of the plaintiff to put the animal on the highway, the plaintiff was entitled to recover. And a plaintiff may recover, though he might have prevented the accident, provided he was in no degree in fault in not endeavoring to prevent it. (*Vennall* v. *Gardner*, 1 Cr. & M. 21.)

"In *Butterfield* v. *Forrester* (supra), the defendant had placed an obstruction in a street in Derby, and the plaintiff, who was riding very violently, rode against it, and was hurt. It was held, that he could not recover, if, with reasonable and ordinary care, he could have seen and avoided the obstruction. In *Lack* v. *Leward*, (4 Car. & P. 106), Tenterden, C. J., ruled, that if the accident could have been avoided, but for the negligence of the plaintiff, he could not recover. (See also *Lutford* v. *Large*, 5 Car. & P. 421; *Pluckwell* v. *Wilson*, Id. 375; *Woolf* v. *Beard*, 8 Car. & P. 373; *Hawkins* v. *Cooper*, Id. 473; and *Flower* v. *Adam*, 2

Taunt. 314.) In *Thorogood* v. *Bryan*, it was also decided that a passenger in a public conveyance, is so far identified with the driver of it, that the negligence of the driver becomes the negligence of the passenger.

"Two cases have been recently decided, in which the plaintiff had, by his own conduct, increased the amount of the injury. In *Greenland* v. *Chaplin* (19 L. J., Ex., 293), the plaintiff was a passenger on board a steam-boat, and was injured by the falling of its anchor, in consequence of a collision with a steamer belonging to the defendant. There was conflicting evidence as to the propriety of the mode in which the anchor was carried, and also whether the plaintiff had not placed himself in a dangerous position. It was held to be a misdirection, to tell the jury that the plaintiff was not entitled to recover, if there was negligence in the stowage of the anchor, or in placing himself in the position he did, although the collision occurred from the negligence of the defendant. Pollock, C. B., in delivering the judgment of the Court, said, 'The man who is guilty of a wrong, who thereby produces mischief to another, has no right to say, "Part of that mischief would not have arisen, if you had not been yourself guilty of some negligence;" and I think that where the negligence did not in any degree contribute to the immediate cause of the accident, negligence ought not to be set up as an answer to the action; and certainly I am not aware, that, according to any decision that has ever occurred, the jury are to take the consequences, and divide them in proportion, according to the negligence of the one or of the other party.'

"In *Rigby* v. *Hewitt* (19 L. J., Ex., 291), the action was against the owner of an omnibus, to recover damages for injuries sustained by the plaintiff, by being thrown off another omnibus, by the negligence of the driver of the defendant's omnibus. It appeared that the omnibuses were racing at the time, and that the defendant's omnibus struck against the one on which the plaintiff was riding, and caused it to swing against a lamp-post, by which the plaintiff was injured. Had the omnibus which was struck, not been proceeding so rapidly, it might have been pulled up after the collision, and the accident have been prevented. Rolfe, B., in summing up, told the jury that the plaintiff was not disentitled to recover, merely because the omnibus he was on, was driving at a furious rate; and that if the jury thought that the collision took place from the negligence of the defendant's driver, so that the other driver was not in fault, in not endeavoring to avoid the accident, then the defendant was liable. This ruling was supported by the Court above.

"In the two last cases, Pollock, C. B., doubted whether a person guilty of negligence, was responsible for *all* its consequences, or only for such as might reasonably be expected to result under ordinary circumstances. In the course of the argument, his Lordship asked, 'If a person choose to walk in a crowded street, with an open knife under his coat, and another person wrongfully runs against him, is he to be responsible for all the damage that the knife may inflict upon the person who carries it?' The rest of the Court seemed to be of opinion, that he would be answerable to the full extent; but it was not necessary to decide the extreme case, on either of the occasions above referred to."

Barristers in England. — The Bar of England appears to be overcrowded to an extraordinary extent in these "piping times of peace." It appears that in the year 1800 the number of Barristers was 773, and they amount now to 3,274. During the same time the Attorneys have increased from 5,109 to somewhat under 10,000. The population has been nearly doubled, and the Attorneys appear to have merely kept pace with it; whilst the Bar has increased fourfold.

The Encroachment of Popery. — A requisition having been signed by a considerable number of the members of the Incorporated Law Society, the Council have directed a special general meeting to be convened for Tuesday, the 3d December (a certain length of notice being requisite), to take into consideration an address to Her Majesty, and petitions to both Houses of Parliament, from the Attorneys and Solicitors of England, relating to the inroad attempted to be made by the Pope of Rome upon our laws and constitution.

Notices of New Books.

Report of the Case of John W. Webster, Master of Arts and Doctor of Medicine of Harvard University; Member of the Massachusetts Medical Society, of the American Academy of Arts and Sciences, of the London Geological Society, and of the St. Petersburg Mineralogical Society; and Ewing Professor of Chemistry and Mineralogy in Harvard University; indicted for the murder of Geo. Parkman, Master of Arts of Harvard University, Doctor of Medicine of the University of Aberdeen, and Member of the Massachusetts Medical Society; before the Supreme Judicial Court of Massachusetts; including the hearing on the petition for a writ of error, the prisoner's confession, statement and application for a commutation of sentence, and an Appendix containing several interesting matters never before published, by Geo. Bemis, Esq., one of the counsel in the case. Boston: Charles C. Little & James Brown. 1850.

In regard to the melancholy case which is chronicled in the above volume, we have no wish to renew discussion. It has already been productive of too much painful and exciting feeling. But as to the manner in which Mr. Bemis has performed his task, we may be permitted to say that he has entitled himself to great credit for his thoroughness and accuracy. We have no doubt that the present report is as correct as it could have been made. There is much in it which cannot be found elsewhere, and much which stated, as is here stated, will tend to remove serious error. But after all, we cannot but hope that the whole case with all its terrible associations will be forgotten; and that, if the ends of justice required the exaction of the extreme penalty of the law, that that having been executed, a due regard for the surviving friends of the prisoner may throw a charitable veil of oblivion over his crimes.

REPORTS OF CASES ARGUED AND DETERMINED IN THE HIGH COURT OF CHANCERY, DURING THE TIMES OF LORD CHANCELLOR COTTENHAM. By *T. I. Phillips*, Esq., Barrister at Law. With notes and references to both English and American Editions. By E. FITCH SMITH, Counsellor at Law.—Vol. II. 1847–1849. New York: Banks, Gould & Co., Law Booksellers. Albany: Gould, Banks & Gould, 475 Broadway.

This is a most valuable reprint of a most valuable series of English Chancery Reports. This volume contains a large number of most valuable cases decided by the late Lord Chancellor. Several decisions upon different questions connected with Railroad Law, which is now getting moulded into a certain degree of system in England, will be read with interest.

Insolvents in Massachusetts.

Name of Insolvent.	Residence.	Commencement of Proceedings.	Name of Commissioner.
Andrews, John S.	Boston,	Dec. 18,	John M. Williams.
Appleton, Thomas	Boston,	" 23,	John M. Williams.
Baker, Rd. & Wm, partners	Gardner,	" 16,	Henry Chapin.
Barney, George T.	Boston,	" 6,	John M. Williams.
Bliss, Orvis L.	Grafton,	" 19,	Henry Chapin.
Buck, Ralph W.	Lanesborough,	" 25,	Thomas Robinson.
Cleaveland, Reuben Jr.	Springfield,	" 4,	George B. Morris.
Colby, George W.	Boston,	" 31,	John M. Williams.
Dascomb, Jacob	Andover,	" 12,	John G. King.
Downs, Albert	Lowell,	" 19,	Asa F. Lawrence.
Dudley, David W.	Douglas,	" 26,	Henry Chapin.
Farwell, Francis W.	Clinton,	" 19,	Henry Chapin.
French, Ephraim	Berkley,	" 27,	David Perkins.
Girdler, Wm. S.	Haverhill,	" 9,	John G. King.
Hastings, Jonathan L.	Oakham,	" 2,	Henry Chapin.
Hatch, Samuel S.	Wareham,	" 26,	Welcome Young.
Houghton, Horace	Worcester,	" 30,	Henry Chapin.
Ingersoll, James	Haverhill,	" 9,	John G. King.
Knox, Daniel M. C	Quincy,	" 30,	Francis Hilliard.
Lazell, Elias J.	Great Barrington,	Jan. 7,	Thomas Robinson.
Lincoln, Francis, 3d	Cohasset,	Dec. 12,	Francis Hilliard.
Lothrop, Cyrus H.	Taunton,	" 4,	David Perkins.
Moore, Thomas	Topsfield,	" 10,	John G. King.
Muchell, Volney	Chicopee,	" 11,	George B. Morris.
Newell, Otis	Springfield,	" 27,	George B. Morris.
Nickerson, Cyrus	Hopkinton,	" 21,	Asa F. Lawrence.
Noyes, Richard P.	Worcester,	" 2,	Henry Chapin.
Paige, George W.	Boston,	" 31,	John M. Williams.
Parker, Wm. L.	Palmer,	" 21,	George B. Morris.
Perkins, C. W. & A. P.	Reading,	" 27,	Asa F. Lawrence.
Place, Henry	New Bedford,	" 25,	Daniel Perkins.
Porter, Adolphus	Orange,	" 13,	D. W. Alvord.
Portugall, Louis	Springfield,	" 20,	George B Morris.
Prescott, Wm., Jr.	Boston,	" 16,	John M. Williams.
Putnam, Andrew J.	Worcester,	" 12,	Henry Chapin.
Richardson, C & W.	Waltham,	" 2,	Asa F. Lawrence.
Richmond, Samuel	Taunton,	" 11,	David Perkins.
Ross, Hibbard P.	Worcester,	" 25,	Henry Chapin.
Savage, George	Boston,	" 3,	John M. Williams.
Sears, William	Charlestown,	" 27,	Asa F. Lawrence.
Sibley, Ira T.	Oxford,	" 19,	Henry Chapin.
Snow, Ransom K.	Dalton,	" 23,	Thomas Robinson.
Talbox, Wm. Jr.	Reading,	" 11,	Asa F. Lawrence.
Train, H. D.	Roxbury,	" 9,	Francis Hilliard.
Trask, Dexter B.	Springfield,	" 19,	George B. Morris.
Walton, Daniel	Natick,	" 7,	Asa F. Lawrence.
Warren, Thomas D.	Boston,	" 23,	John M. Williams.
Wilder, Luke Augustus	Clinton,	" 16,	Henry Chapin.